NOT WITHOUT PREJUDICE

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By

LORD HEWART

In magnis et voluisse sat est

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NOT WITHOUT PREJUDICE

I

HORACE[1]

NEARLY two thousand years have passed since Horace calmly predicted his own immortality If he could look to-day into the ledgers of publishers and booksellers, his confidence would not be diminished As Francis Bacon said of his Essays, the poems of Horace "come home to men's business and bosoms" He seems to be unique in all literature for his *urbanitas* In good sense, perfect taste, and knowledge of the ordinary man he still has no rival

One reason why it is so difficult to speak of him is that nobody thinks of painting the lily or of gilding refined gold If the Epistles and the Satires are full of fortunate strokes of wisdom, men recognise with mingled affection and awe the exquisite finish and judgement of the Odes, their balance and subtle rhythm, their delicate humour and proportion And, being immortal, he is always contemporary Contrasts between ancient and modern are as meaningless for him as they would be about the sunshine It would, for example, be easy and agreeable to compile from Horace an indexed commonplace book for leader-writers and statesmen (They are, of course, correctly named in that order because both leader-

[1] Address to the Horatian Society, London, 23 October, 1936

writers and statesmen say much the same thing, only leader-writers say it first and in a literary form) Also he observed with a clear eye the " masks and mummeries and triumphs of the world " Yet he was *parcus deorum cultor et infrequens*—he rarely troubled the pew-openers If he had been up at Oxford half a century ago he would hardly have objected to the remark of the most famous Master of Balliol that Voltaire had done more good than all the Fathers of the Church put together Perhaps the greatest thing of all in Horace is his complete artistic independence, so ironically superior to the powerful ruler and the powerful patron, making them seem—and indeed making everybody seem—just " moments in the eternal silence "

Horace, to be sure, did not deal much in immensities and eternities Yet it would not be wrong to say of him what Tennyson said of Virgil " all the charm of all the Muses often flowering in a lonely word " , and it would clearly be right to repeat of him what Shelley had to say of the preparation of the poet

> He will watch from dawn to gloom
> The lake reflected sun illume
> The yellow bees in the ivy bloom,
> Nor heed nor see what things they be—
> But from these create he can
> Forms more real than living Man,
> Nurslings of Immortality

Mankind owes a great debt to the noble father of Horace—noble in the best sense of an abused word—who sacrificed much in order to obtain for his grateful son the best education that Rome and Athens had to offer. It is pleasant to think of the young man, when he had said good-bye to the groves of Academe and had done his bit of soldiering, relieving the monotony of a clerkship in

the Treasury by occasional writing Samuel Johnson said that no man but a blockhead ever wrote except for money, and of course nobody was ever less like a blockhead than Horace The fact that he was definitely "agin' the Government," and wrote lampoons on the fashionable world, did not prevent Varius and Virgil from introducing him to Maecenas At first that eminent patron took little notice of him, thinking perhaps that he was Grub Street, though not too bad Grub Street, and indeed Horace has said that he did not make the best of himself In a well-remembered passage in the Satires he describes how he spoke a few faltering words, being too bashful to say more, and "*respondes, ut tuus est mos, pauca abeo*" He was evidently a shy and proud youth Nine months later, however, Maecenas, impressed by something of his that he had read, suddenly took him up and made him one of his intimates When Horace was twenty-eight—two years before the first book of the Satires was published—he was one of the party that went with Maecenas to Brundisium It looks as if Maecenas, who was a Holland House kind of Liberal, rather liked the youngster's tone, his independence and reserve, and thought he might be useful politically Both Maecenas and Augustus were a little alarmed at the excesses of the "fast set," and Horace's balance and gift of satire may have been thought serviceable When, a little later, Maecenas gave him his Sabine Farm, in the pleasant valley of Digentia, north of Tivoli, Horace's cup of happiness was sufficiently full He never long forgot

Desiderantem quod satis est neque
tumultuosum sollicitat mare,

and was so good and tactful a private secretary to Maecenas that Augustus wanted him—though in vain—for his own

third book, which wise schoolmasters set for youthful repetition, sustain a wonderfully high and consistent elevation Yet Horace was not naturally a lyric poet He wrote slowly and with infinite pains But it was an achievement not less than amazing to subdue the Latin language to lyrics of exquisite finish It is natural to contrast the indifferent Sapphics of Catullus or the inferior Alcaics of Statius No one tried to imitate Horace He was indeed more original than Virgil, whom people have been imitating ever since, and who was himself an imitator But "*curiosa felicitas*" is not the same thing as what is called "divine afflatus"—a quality not to be found in Horace The wild eye in frenzy rolling had no attraction for him His Odes are the triumph of taste, self-criticism, and downright hard work Not that he never made a mistake He could even, if the text is really genuine, thrust a footnote about anthropology into the midst of an elevated poem But it would be pleasant to collect all he has to say of polishing, pruning, erasing, correcting, revising, and postponing a work of art—master as he was of the art that conceals art and of the hard writing that makes easy reading

Perhaps it may be said that, if Tennyson is the poet of the drawing-room, Horace with his gift of friendship is the poet of the Bachelors' Club—of those inner circles of male friends where the talk is at once intimate yet reserved, dignified but not stilted, human though fastidiously human All his characteristics might perhaps be deduced from this quality of his temperament He is always lucid, always brief and compact, always simple, always easy, and always very much alive What is it that makes a man a bore to his companions? Is it not when, instead of being lucid, he rambles or tries to get

at an idea that is beyond his power of expression, when he is long-winded instead of being brief, when he is affected or complicated, and when, instead of being easy, he poses, holds out top notes, and treats his friend as if he were a public meeting? It was because Horace the poet was so superlatively right in all these essential respects that he was also the first, and probably the best, of all literary critics Perhaps somebody may exhibit the truth in an imaginary conversation between Horace and Samuel Johnson on an autumn evening at the Sabine Farm, not without a suitable accompaniment of the best wine-jars from the right consulship

Horace remains the palmary example of consummate workmanship in that middle range of sentiments in which is wisdom, though not inspiration, nor the force of creation and growth Perhaps it may be said that he is to poetry what a vintage port is to a dinner, and, as port is usually drunk when the ladies have gone, so Horace is the poet of men and of men only No woman did or could like him, for he is the poet of masculine friendship and the club Perhaps Horace would hardly have disdained the description But, if another metaphor be more fitting, it may be thought that by the miracle of his design, his ingenuity, and his disciplined art, man's experience is so depicted, enclosed and set as to lie like an opal in your hand He had his reward In one mood he wrote

quodsi dolentem nec Phrygius lapis
nec purpurarum sidere clarior
delenit usus nec Falerna
vitis Achaemeniumque costum,
cur invidendis postibus et novo
sublime ritu moliar atrium?
Cur valle permutem Sabina
divitias operosiores?

But it was the same hand that also wrote

Me doctarum hederæ præmia frontium
dis miscent superis, me gelidum nemus
nympharumque leves cum Satyris chori
secernunt populo, si neque tibias
Euterpe cohibet nec Polyhymnia
Lesboum refugit tendere barbiton
quodsi me lyricis vatibus inseres,
sublimi feriam sidera vertice

II

THE CENTENARY OF PICKWICK[1]

"'ALL inside,' as the bridegroom said when he had locked the door" So said Praxinoe to Gorgo, when at length they had made their way to the Festival of Adonis, in the immortal fifteenth Idyll of Theocritus The sweet singer of Syracuse probably was not aware that he was anticipating, nearly three centuries before the Christian era, the mode of speech to which Sam Weller was destined in 1836 to give a world-wide currency Nay, who can say how familiar such gnomic utterances were even in 280 B C ? What is originality (somebody asks) if it be not undetected plagiarism ? And perhaps the question was plagiarism too

A hundred years ago this morning, over the youthful hand of Charles Dickens, the first 24 pages of The Posthumous Papers of the Pickwick Club" came from the press, and every day during the century that has passed the effects of the masterpiece have rivalled the uncounted laughter of the sunlit sea True, the chorus of approval has never been quite unbroken There has commonly been, even from the beginning, a dissenting group of "highbrows" Walter Bagehot, for example, was good enough to say of the prose of Dickens that "it is not the writing of an evenly developed or of a highly cultured mind" Perhaps he meant "highly

[1] 31 March, 1936

cultivated " But the mass of witnesses on the right side has never failed to be overwhelming It is not merely that the world forms its judgements without remorse The essential greatness of Charles Dickens—and " Pickwick " is Charles Dickens at his best—has compelled the admiration, as it has won the affection, of the most austere and fastidious minds It is pleasant to recall a little conversation which took place over 40 years ago between Benjamin Jowett (then Master of Balliol) and some other distinguished Oxford men upon the topic Who is the greatest living writer of English ? There were at the time some skilled craftsmen at work, including Ruskin, Swinburne and Tennyson The jury disagreed But upon one point, at any rate, The Master of Balliol was very clear " Of course," he said, " if Charles Dickens had been still alive there would have been no doubt at all " Jowett, indeed, had a way of saying that every sensible person is in the habit of reading " Pickwick " at least twice a year And in October, 1888 (for example), he wrote to a friend " If you are dull, try as a remedy a good reading of Dickens, especially Pickwick " What was good enough for Jowett, and good enough for Andrew Lang, and good enough for Calverley has proved, and is proving, to be good enough for many millions The shop-windows and the railway bookstalls show how new editions pour out to supply the demand

It would be an agreeable thing (would it not ?) to see a few hundred " Dickensites " or " Dickensians "—or shall we not rather say " lovers of Dickens " ?— at work upon Calverley's famous examination paper with nothing to help them but a plain text, and, if Lang were alive to write it, it would be an agreeable thing (would it not ?) to read an imaginary conversation (no copyright is claimed for the idea) between Samuel Weller and Charles

Chaplin Or what more pleasant pastime is there for an idle evening than to hear somebody with a good voice reading aloud the 33rd chapter, containing the Valentine and the Report of the Committee of the Brick Lane Branch of the United Grand Junction Ebenezer Temperance Association? What is not always recognised even by the true worshipper is the remarkable earliness of the age at which Charles Dickens created this exhilarating encyclopædia of wit and wisdom, teeming with a humour that is always unexpected, quaint, original, personal, and all his own He was, in fact, 24 years old His native and fertile genius had not been cabined and confined within the regular curriculum of school or college His school was the streets of Portsea, of Chatham and of Camden Town His university consisted of clerks' rooms in Lincoln's Inn and Gray's Inn, the various law courts of London, and the reporters' seats in Doctors' Commons and the Parliamentary Press Gallery And to this material and training-ground he brought quite unrivalled powers of observation, imagination and sympathetic understanding Was there ever a more perceiving, receptive and yet original mind?

It may be doubted whether the history of literature contains a parallel to the early and prolific fertility of Dickens The mere years in a chronology offer little information The point of interest is—is it not?—to see how old a man is when he accomplishes something At the age of 24 Dickens created "Pickwick," at 25 "Oliver Twist," at 26 "Nicholas Nickleby," at 28 "The Old Curiosity Shop," at 29 "Barnaby Rudge," at 30, after a visit to the United States, "American Notes," and at 31 "Martin Chuzzlewit" and "Christmas Books" Two questions have been asked before which may be asked again One is whether, in the whole history of the

human mind, there has been any similar record of achievement at the like age or within a like number of years The other is whether the performance is not well calculated to fill every Englishman of 30 with a sense of personal humility and national pride And, of course, the creative work of Charles Dickens continued almost unceasingly until his untimely death at the age of 58

Towards those who offer him the unconscious homage of praising with faint damns we may observe the demeanour of St Augustine's adder, who stopped one ear with his tail and pressed the other against the dust It has been said, and truly said, that, of all great writers since Scott, Dickens is probably the man to whom the world owes most gratitude—no other has caused so many sad hearts to be lifted up in laughter, no other has added so much mirth to the toilsome and perplexed life of men, of poor and rich, of learned and unlearned Nor did he create anything better than "Pickwick," nor in "Pickwick" anything better than Sam Weller It is recorded that of the first number of "Pickwick" 400 copies were published Sam Weller, the ideal Cockney, made his appearance in the fifth number, and of the fifteenth number 40,000 copies were sold The public responded at once to the vivacity, the high spirits, the irresistible fun and inventiveness of the author Men recognised the power that could fill their fancies with delightful and unimagined friends Memory is, after all, the only real foundation of perpetual youth, and can any man now on the less athletic side of 60 forget the sheer delight with which, in his school-days, he first made acquaintance with Sam Weller? There never was such another as Charles Dickens, a wise man said, nor shall we see his like sooner than the like of Shakespeare Was it not Jowett who wrote "I do not think that we

should be always drawing morals or seeking for edification"? And within whose power is it to do anything more really serviceable to mankind than to excite a hearty laugh or a real smile? How many have chuckled over the sly indications of professional knowledge coupled with the perfect touches of humorous reflection Take, for one out of a hundred examples, the account (in chaptor 20) of the writ in "Bardell v Pickwick"

"The writ, sir, which commences the action," continued Dodson, "was issued regularly Mr Fogg, where is the *præcipe* book?"

"Here it is," said Fogg, handing over a square book, with a parchment cover

"Here is the entry," resumed Dodson, "'Middlesex Capias *Martha Bardell, widow, v Samuel Pickwick* Damages £1,500 Dodson and Fogg for the Plaintiff, Aug 28, 1830' All regular, sir perfectly"

Dodson coughed and looked at Fogg, who said "Perfectly" also And then they both looked at Mr Pickwick

This passage, at the beginning, is accurate professional recollection humorously applied But from Dodson's cough to the end it is the quintessence of Charles Dickens

There have been those—so unconscionable is human presumption—who have ventured to pick holes in the law exhibited or concealed in "Bardell v Pickwick" Why, they ask, did not Serjeant Snubbin call Mr Pickwick, or Serjeant Buzfuz call Mrs Bardell? One sufficient answer is that if Dickens, who knew a good deal of law, had permitted either adventure he would have been 38 years ahead of the law of evidence, which nevertheless does move Perhaps a more profitable inquiry is to consider whether Mr Pickwick would have been the gainer if, at the date of the trial, the law had

permitted him, as it did not, to give evidence on his own behalf Frank Lockwood, good at need, thought that Mr Pickwick would have gained nothing Yet perhaps the opinion tended to impute to the jury a knowledge of the whole story, which the jury, unlike the reader, might not have possessed

But enough of statistics, as they say at Westminster Let us rather reflect with Andrew Lang that the native naked genius of Dickens—his heart, his mirth, his observation, his delightful high spirits, his intrepid loathing of wrong, his chivalrous desire to right it—will make him for ever the darling of the English people

III

WILLIAM, LORD STOWELL[1]

MASTER, my Lords, and Gentlemen,—A hundred and seventy-five years ago a boy of sixteen came up to Oxford from Newcastle as a scholar of Corpus His name was William Scott His father was a small publican, and his mother was the daughter of a local tradesman He had attended the Grammar School in Newcastle—a school, that is to say, not for the bad teaching of English grammar but for the good teaching of *literæ humaniores* The headmaster had been a Fellow of Peterhouse Scott took his degree at nineteen, and three weeks afterwards was elected to a Fellowship at the College which it would be superfluous to describe as the best College in Oxford and, therefore, in the world As he was a good scholar and a lovable man, he was naturally quite at home within these walls Here he found Robert Chambers, already teaching law both in the College and in the University In 1765 Scott became Praelector in Greek and Tutor Eight years later he became Camden Reader of Ancient History In 1774 he became Dean and held this office until March 20th, 1776 He found, indeed, as he wrote to his father, that the business in which he was engaged was "destructive to health" Can any one wonder, then, that he betook himself to the less exacting life of Parlia-

[1] Speech at the Stowell Centenary Dinner, University College, Oxford, 9 May, 1936

ment, the Bar, and the Bench? At the prudent age of thirty-five he was called to the Bar, at thirty-seven he resigned his Fellowship, and at fifty-three he was appointed Judge of the High Court of Admiralty

He sat as a Judge for thirty years—that is, until he was eighty-three years old, as also did the Judge whose death was far the greatest loss the Bench has suffered in my time—I mean, of course, my friend Mr Justice Avory Lord Stowell (who had become a Peer at the age of seventy-six) survived his retirement for eight years, and died at the tranquil age of ninety-one Meantime, for twenty years from 1801 to 1821, he had faithfully represented this University in the House of Commons "In the main", his biographer writes, "he was a steady opponent of reform"—or, would it be more accurate to say, of that particular combination of humbug and false pretence which is sometimes miscalled reform? Looking back over that full and varied life, one may say perhaps that Stowell so remembered the claims of the mind as not to forget the lawful demands of the body He was not, any more than his friend Dr Johnson was, a soured practitioner of those "fantastic anti-social virtues" against which Dr Bright preached, not without interim and impressive reduplications, in my first term in this College Neither William Scott nor Lord Stowell had any notion of cultivating the Muse on a little oatmeal In a case involving questions about the disbursement of certain funds, he said from the Bench "I approve of dining It lubricates business" He certainly knew how to eat and even to drink Boswell says that he was a "two-bottle man" His brother said of him "he will drink any given quantity of port" And I have read a letter from an old Univ man which contains this passage "I went up to Univ in

1872, and there was then a venerable white-haired old Common Room Butler—nearly eighty, I should think, who had begun life as Common Room boy He told me that Lord Stowell and Lord Eldon used to come back to Oxford, every now and then, for a little jaunt He had waited on them in Common Room, and they always had a beefsteak pudding with oysters, and *several* bottles of port—I forget the number"

Conviviality and political controversy seem to have flourished in Oxford in the eighteenth century, and it may be that the eminence of many of the Fellows of Colleges in these pursuits was even more conspicuous than their scholastic attainments But Scott did not share the dissatisfaction with which some eighteenth-century figures regarded the treatment they received from the University Dr Johnson at Pembroke had discovered that his tutor's lecture in logic was not worth half the twopenny fine imposed for the offence of missing it Adam Smith had presented the strange spectacle of a Balliol man who could not pretend to be proud of Balliol Gibbon too had spent what he counted the most unprofitable months of his life at Magdalen "The Fellows or monks of my College", he wrote, "were decent easy men, who supinely enjoyed the gifts of the founder From the toil of reading or thinking or writing they had absolved their conscience, and the first shoots of learning and ingenuity withered on the ground without yielding any fruit to the owners or the public" But with Univ William Scott was well content He quickly decided that his younger brother must share the benefits of life within this College "Send Jack up to me" was the message he sent home, and, if this advice had not been taken, it may be that the young man who was to become Lord Eldon would have spent his

life in the honourable calling of a coal-fitter in Newcastle

There is no need to remind you that William Scott became here the close friend of Robert Chambers, perhaps the greatest figure of his time in Oxford, that both came from the North, both were brilliant talkers, and both were excellent scholars, and that they were united by that graceful interest and affection which sometimes, in the happiest cases, come to exist between master and pupil For proof of their quality nothing more is needed than the fact that they became close friends of Dr Johnson, who by his will made Scott an executor, with Sir Joshua Reynolds and Sir John Hawkins Nobody here has forgotten that the mezzotint of Johnson which is now in the Senior Common Room is the gift of Stowell The portrait by Hoppner and the statue in the Library ought not to mislead us Stowell was short and fat—*brevis et obesus*, as the historian says of Horace He was also fair-haired But he was *teres* and *totus* as well as *rotundus*, and it is recorded that throughout his life he was welcome in the best society of his time—not only as a scholar but also as a wit and a master of polished phrase

We must not call Stowell a jurist That is a term that it seems better to reserve for a person who knows a little of the law of every country except his own But it is a commonplace to say that as a Judge he was and remains in the very first rank, and that nobody at any time has surpassed his services to maritime and international law Most Judges are compelled, through no fault of their own, to labour in a thrice-ploughed field It was the happy fortune of Stowell, in an eventful moment of history, to have the unharvested sea for his portion What more can mortal man desire than the combination

of sovereign gifts with the opportunity for beneficent uses? He studied the civil law as part of a liberal education, and of the literary excellence of his judgements Brougham said "If ever the praise of being luminous could be bestowed upon human composition, it was upon his judgements" Lyndhurst thought that it was as vain to praise as to imitate him The fact is that, in the thirty years during which he presided over the Court of Admiralty, he settled many principles of Admiralty law, while in Prize, where he decided most of the cases that arose during the Napoleonic Wars, he settled and established the principles that govern the modern conceptions of the rights of belligerents and neutrals

Lord Stowell found little to guide him There were, no doubt, the treatises of Grotius, Vattel, and some other masters of the law of nations There were a few decisions in print, and a few others in manuscript notes But the questions that arose for decision were often novel, and it was necessary for him to formulate and to expound the hitherto unapplied principles that should govern them He was a lawgiver, extending and adapting a previously existing system to new conditions of world-wide war Those of us who, as counsel, had to argue many scores of Prize Cases during and after the Great War well know that it was rarely necessary to cite later decisions than his, and it was almost never that it was even possible to go to an earlier period The conditions of the Napoleonic War were such as to give rise to points of infinite variety, and the fact that they were decided by one Judge rendered possible that unity which, fortified by learning, wisdom, and authority, produced a new, coherent, and complete system of the Law of War Neutral Rights, Capture, Convoy, Blockade, Search, Orders in Council and their validity for

belligerents, Letters of Marque, Licences to Trade, and almost every other topic that arose in the Prize Court during and after the Great War may fairly be said to have been illustrated, if not governed, by some decision of Stowell's The six volumes of Christopher Robinson are full of his decisions, and the reader observes in them the qualities of Burke's work at its best—the vigorous grasp of masses of compressed detail, the wide illumination from great principles, the strong and masculine feeling for the two great ends of Justice and Freedom, the large and generous interpretation, the morality, the impartiality, the vision, the noble temper

Let me add, in fairness, that in the years from 1915 to 1922 the main burden of adapting and translating those decisions into the forms and the terms of contemporary law and commerce fell upon a brilliant Judge who until the War had felt and said that he had been side-tracked and thrown away in a minor Division of the High Court—I mean my lamented friend, Sir Samuel Evans Stowell was a real man and not a bookworm—a scholar and not a mere lawyer To-night, in this place —nay, in this home—which Stowell loved, we rejoice to honour his name It is right that we should never cease to acknowledge his greatness It is right that we should remember here with special pride his intellect, his character, and his public service

IV

LORD CARSON[1]

MY noble and learned friend Lord Carson, we may be very sure, is not a party question On the contrary, he is a national and Imperial possession The whole world of the law, and many of the persons who (although they have not yet been in prison) tend to regard law and lawyers with uncharitableness or even hatred, have been admiring his fortitude in fighting and conquering his recent illness It is easy to forget that in February last he reached (according to the mere computation of the calendar) his eighty-first birthday I hope I do not disclose a Cabinet secret if I say that of his sixty-fifth birthday he remarked to me, " This is the happiest birthday I have known " Perhaps others, *in consimili casu*, may have repeated the remark

It is Lord Carson's habit to say that he " died " when he left the Bar and the House of Commons—putting those attractive institutions in that order For some years he has hovered like an eagle above the storms of anarchy And those are legion (for they are many) who will never forget his pluck, frankness, generosity, loyalty, and kindness—that tender heart, that gay, invincible wit It is fifty-four years since Benjamin Jowett, preaching in Balliol College Chapel on Ignatius Loyola, added a postscript on Disraeli, who had just died " Among the statesmen of his day," said the Master of Balliol, " he

[1] 18 September, 1935

had that quality which, upon the whole, seems of all others the most necessary in politics—strength And though in that personality there was something upon which men did not venture to intrude, there were also the gentlest and most loyal feelings towards those to whom he was bound by any ties of gratitude, to a few friends whom he grappled to himself with hoops of steel To young men, especially, his career has a peculiar interest For there was perhaps no man who had greater tenacity of purpose, or who more clearly foresaw from the beginning of his life the end of it" Change the name, and the words are spoken of Lord Carson He might have been Prime Minister, but he remained faithful to the law He might have been all things to all men, but he remained faithful to Ulster One might say of him what somebody—it does not matter who—has said of another the man who knows no cause but self bows in unconscious homage before the man who knows no self but his cause

When I think over the past forty-three years, the figure of Lord Carson appears in many scenes Let me mention only three One evening in the House of Commons when the question of Ireland (the only public question, I think, upon which he and I did not agree) was almost at boiling-point, he wound up a typical speech, amid execration from one side of the House and tumultuous cheers from the other side, with the words "My place is in Ulster," and marched out behind the Speaker's chair Many of us thought that he was well on his way to gaol Not many weeks afterwards, on the day following one of his vehement speeches on the platform, I had the temerity to say to him in the Lobby that I rather wondered how he could permit himself to make such a speech "You forget," he said, "that for

some years I have been sitting opposite to your friend (naming him) on the Treasury Bench Don't be alarmed Nothing will happen" And nothing did happen Some months later, on the day when he resigned office as Attorney-General and a Cabinet Minister in the Coalition Government of 1915, he took me apart and told me what he had done and why This is not the time to recall the grim narrative It is enough to say that he would not share for another day the responsibility for a method of procrastination which, he was convinced, could lead only to failure in the war

Lord Carson was in the House of Commons for thirty years (1892 to 1921) But he became an Irish "silk" in 1889, and an English "silk" in 1894 For many years before he became a Lord of Appeal in 1921 he had been by far the best advocate at the Bar That is not to say that the rest "also ran" But he (like Homer) was in a class by himself A troublesome state of health prevented him from doing more than one case at one time But to that case he devoted himself, from the first moment to the last, with unsurpassed acumen, speed, directness, clearness, and (when the occasion arose) eloquence He avoided (and here is a lesson for my brilliant friends of the long robe) the impression which is so often produced upon the minds of jurors, and even of judges, by the fitful departure of learned counsel to attend to something more entertaining (or more lucrative) in another court There is a pleasant story of his acting as unofficial interpreter, in Switzerland, between some French persons who knew little English and some English persons who knew little French One of the French ladies asked him at the close "what language the strangers spoke"

"They speak English," he answered

" But what are you ? " she asked

' Oh," he replied, " I am Irish "

" Really," she said, " and yet you seem to understand "

Yes, he did indeed seem to understand, as everybody who has been thrilled by the spark and the sparkle of his cross-examination is well aware It is pleasant to remember that in his latter years, at any rate, he has with good reason been happy May there be many more of such years in store for him

" *Heureux qui comme Ulysse a fait un bon voyage* "

V

LORD READING[1]

"STAND firm!"

The compelling voice of the masterful advocate rang through St George's Hall, and the Special Jury of the City of Liverpool sat spell-bound The scene is at this moment before my eyes Sir Edward Russell, who was highly thought of in Liverpool, was on his defence for words published in his newspaper, which also was highly thought of in Liverpool It was said that the words were defamatory of some licensing justices in the sense that they represented the justices as being too friendly to the licensed trade The plaintiffs had not been content to launch the ordinary action for damages They had exhibited a Criminal Information, and the question was whether the defendant was to be convicted of a crime Strong feeling had been stirred on both sides, and each had a strong team for the contest The leading counsel for the defendant was Rufus Isaacs, then (in 1905) at the very top of his forensic form, and from an early moment in the long trial he had undoubtedly made "heavy weather" with his Majesty's Judge of Assize Everybody—including Rufus Isaacs—was expecting a summing-up distinctly adverse to the defendant But the brilliant advocate, of course, saw his opportunity, and took it In his final address to the jury, having reviewed the evidence with consummate

[1] 31 December, 1935

skill, and not without occasional heat, he came with well-considered steps to a thrilling peroration I will not repeat it, though I know it by heart The point of his closing words was that the verdict depended not upon law but upon fact, and questions of fact were questions for the jury "And it may be, gentlemen, and I trust it is the case, that as you have listened to the evidence, and as you have again and again considered it, your minds have been driven irresistibly to one clear conclusion—a conclusion favourable to the defendant If that be so, and I trust it is so, then remember that you are sworn to give a true verdict according to the evidence, and, no matter what you may now be about to hear, and no matter from what quarter, I beg you, as you respect your duty and fair play, Stand Firm!"

The jury stood firm all right Some years afterwards, when I happened to be coming home from Dieppe to Newhaven in the same ship with Sir Rufus Isaacs, K C, M P (then His Majesty's Attorney-General), and we were reminding each other of some recollections of the Northern Circuit, I recalled that memorable occasion He had not forgotten it "Let me see, what did I say?" And he repeated his peroration almost word for word

Perhaps he had never done anything better in all his career at the Bar And what a dazzling career it was! Mr Isaacs was not called to the Bar until 1887, when he had reached the comparatively mature age of 27 It may not always be an advantage to be called in the earliest twenties Years may bring experience and greater power of work Almost from the first the young barrister went ahead like a house on fire Vicissitudes indeed he had known, and was still to know But he always knew his case inside out, and nothing could stop him In eleven years he took "silk" Six years later he entered

the House of Commons as member for Reading Four years later he was appointed Solicitor-General, and in the same year Attorney-General After three more years he became Lord Chief Justice of England, and in 1921—after rendering conspicuous service in the field of diplomacy—Viceroy and Governor-General of India

There is a familiar half-line of a pleasant poet's "Amat victoria curam"—which, being interpreted, is "Industry is the bridegroom of success" It may be doubted whether, in the whole history of human endeavour, any man ever worked harder or longer than Rufus Isaacs George Meredith, in that novel which is in some degree an autobiography, says "Rare as epic song is the man who is thorough in what he does And happily so for in life he subjugates us, and he makes us bondsmen to his ashes" Those who have not been through the mill have little notion of the labour of a really busy "silk" Men speak glibly of the eight-hours day But what is demanded is a fourteen or sixteen-hours day, seven days a week, with precious little opportunity for sleep I remember Rufus Isaacs when he was working at the highest pressure saying that before he came to the Bar "he was told it was a bed of roses, but that was quite wrong—it is all bed and no roses or all roses and no bed"

The history of his life at the Bar is a history of most of the well-known common law cases of his time He was the leading figure (for example) in the Titanic Inquiry, the Seddons case, the Archer-Shee case, the Sievier case, the Hartopp case, and the Liverpool Bank case His cross-examination of Whitaker Wright, amid a maze of figures and without recourse to a "note," remains (ever since 1904) one of the marvels of the Bar The gentleman on the top of the Clapham omnibus does

not realise these things But he does realise that something more than a series of happy accidents is required to explain how a man becomes in a short period knight, baron, viscount, earl, and marquess, with a bewildering mass of decorations, signified by nearly all the letters of the alphabet

Lord Reading's work as Lord Chief Justice of England was much interrupted by his missions to the United States in 1915, 1917, and 1918, and was ended by his departure to India in 1921 When he was entertained in April, 1919, by the New York Bar, the distinguished American statesman and lawyer who proposed his health said that " for the first time we have been able to see in one person a Lord Chief Justice and an Ambassador We respect ambassadors, but no ambassador can rank in our minds and hearts with a Lord Chief Justice " I remember well that, on the eve of Lord Reading's successive departures to the United States and to India, some of the judges declined to take part in the farewells in his court They said they could not be parties to any suggestion that it was promotion for a Chief Justice to become an ambassador or a Viceroy I deplored their absence, but was bound to agree with the opinion which explained it

The historian will assess his manifold services The City, after his return, applauded his power of attention and receptivity Members of the Bar love to think of him as one of the greatest advocates of their time, a kind and appreciative leader, a scrupulously fair opponent, and one who embodied all the best traditions of a profession that is proud to have numbered him among its members

VI

ENGLAND[1]

MR PRESIDENT, my Lords, Ladies and Gentlemen,—On this St George's Day, and in this representative gathering of the Royal Society of St George, I have the honour of proposing the toast of "England" It is not easy for any man to speak with prudence or propriety upon the grandeur and glory, the greatness and the beauty, of England—least of all perhaps at a time when so momentous a chapter of English history is on the eve of being opened Anyone upon whom the duty falls may well be conscious of two feelings at the same time—first, that there is so much to be said, and secondly that it has all been so well said already Each one of you naturally thinks at once of those immortal lines which our greatest poet put into the mouth of John of Gaunt —

> "This royal throne of Kings, this sceptered isle,
> This earth of Majesty, this seat of Mars,
> This fortress, built by nature for herself,
> Against infection, and the hand of war,
> This happy breed of men, this little world,
> This precious stone set in the silver sea,
> Which serves it in the office of a wall
> Or as a moat defensive to a house,
> Against the envy of less happier lands,
> This blessed plot, this earth, this realm, this England"

Those ten lines seem to include everything, and an Englishman, as Dr Johnson testifies, is content to say

[1] 23 April, 1937

nothing when he has nothing to say Certainly he will not incline to any words of fustian or effusiveness, which for the hearer are worse than listening, in the melancholy calm of the evening, to the strains of a barrel-organ —not too faint, not too sweet, and not far enough away Is it not a far better thing, as the Parliamentary Candidate remarked "I say ditto to Mr Burke," to be bold enough to remark "I say ditto to William Shakespeare"?

Happily there still exists a contemporary report of the words, or the substance of the words, uttered on a memorable day by an unrivalled statesman—words which are at this moment curiously in point Pericles, as you remember, began first with the ancestors of the Athenians "It is right and fitting," he said, "that on such an occasion the honour should be paid to them Through a long succession of ages it was their valour that enabled Athens to live in freedom, and the last generation, adding to their inheritance the great Empire which we now possess, by great exertions bequeathed it to the citizens of to-day" Turning to their mode of life and the type of their institutions, he said "we enjoy a form of government that does not emulate the laws of our neighbours—we are rather a pattern to others than imitators of them In name, because the government is administered for the benefit, not of the few, but of the many, it is called a democracy, but before the law all are equal in all causes of dispute arising among private individuals, while with regard to our estimate of men, as each one chances to have a reputation in any particular, he is preferred to an honourable place in the public service, not because he belongs to a class or party, but from merit" "Because of the greatness, also, of our city," Pericles added, "everything from every land comes into it, and it is

our good fortune to have a no less intimate and familiar enjoyment of the good things produced in the rest of the world than we have of our own" As for art and knowledge, he said "we study taste with economy and cultivate the mind without being enervated Our wealth we use as an aid to action, and not as a theme for boastful words, while poverty is nothing disgraceful for a man to confess—the disgrace rather is not to do our best to avoid it" Again, "we have this characteristic in a remarkable degree, that we are at the same time most daring and most deliberate in what we take in hand, while with others it is ignorance that produces boldness but reflection brings with it hesitation" Finally, Pericles exhorted his fellow-citizens to observe day by day the power of Athens as it appeared in actual fact, and to become her lovers, "reflecting, when you think her great, that it was by being bold, and taking the trouble to learn their duty, and having a keen sense of honour, that men won this prize" "Of illustrious men the whole earth is the tomb, and their fame is recorded not only in inscriptions upon columns in their own land but in other lands too there is, not indeed a material monument, but an unwritten memorial of the heart"

There is no need to point the parallel, nor does the Englishman need an exhortation to regard his beautiful country with the unsought ardour and constancy of a lover He would not indeed heap upon her unmeaning praises, not offer to her, any more than he would offer to his own mother, a public and elaborate testimonial But he knows with what gratitude and delight he comes back to England after any absence, long or short, from home He knows what qualities of pluck, of tenderness, of sincerity and of strength make up the character of England Looking back, he might dare to say for her

what an English statesman said for himself "In the past there are many things I condemn, many things I deplore, but a man's life must be judged as a whole" He would not deny that the long progress towards justice and liberty has sometimes seemed to hesitate and has even been deliberately thwarted He is not blind to the fact that the yielding of what is due has sometimes appeared to be reluctant and belated But he is also well aware that, if freedom is seriously threatened, this slow-moving, sporting and sentimental race becomes taut and ready for the spring

It is a vague and indefinite thing, this English feeling for liberty The intruder may go a certain distance—far enough, as some may think, to create danger—and no obstacle is put in his way But let him take one step further and in a moment he reels before the defensive blow The Thames flows smoothly past the strong room in which rests Liberty, and beneath the surface of tranquility and detachment that marks the English race there persists a murmur of defiance and power Nothing, it may be thought, could well be more congenial to the English temperament than an attitude of detachment and non-intervention, as nothing could be more alien than a programme of scolding, protesting and passing by on the other side Is it not also manifest that the prospect of defensive peace might be substantially encouraged if, to the knowledge of the whole world, there were, not indeed a treaty or an alliance, because formal documents are hardly necessary between blood-relations, but a complete and perfect understanding with our sympathetic cousins across the sea? When you are told that the good citizen should not say "my country right or wrong" you may perhaps reflect that the good citizen is not prone to think his country is wrong If it

should ever appear to be so, he may be disposed rather to blame those who, at the moment, represent or misrepresent it, and fail to give effect to its better mind—its real self

It is indeed essential to judge by reference to the highest standards But it would be idle to be depressed by the results Englishmen now approaching the age of threescore years and ten have had—to say the very least—the opportunity of seeing, among those that have now passed on to the Elysian fields, one English statesman undoubtedly of the first rank, certainly one first-rate Judge, probably one first-rate soldier, and perhaps one first-rate poet That is not a bad record for a single country in so short a period as three-quarters of a century The whole world has never produced more than one Shakespeare, one Milton, one Homer, one Virgil and one Horace, and none of them has left any known descendant Nobody has ever seen, or will ever see, the poems of Shakespeare junior, or Milton the second, or the younger Homer, the younger Virgil, or the younger Horace It would be quite wrong, therefore, to complain that the immortal lights are so rare and so few Of course they are But that is no reason why the minor lights should not do their best, and aim at any rate at high efficiency and the faithful performance of their duty, and, if there may be an occasional note of distinction, so much the better

In spite of foreign invasion, civil war, and religious persecution the thread of English public life has never once been severed The continuous history of English institutions has already, as the historian reminds us, extended over nearly fifteen hundred years Under these institutions the English nation has enjoyed a degree of peace and prosperity which, at any rate, it

would be difficult to parallel in the records of any other people But, as we are also reminded, it would be an error to suppose that good institutions are the sole, or even the principal, cause of public well-being Institutions in themselves may be dead things They can avail only those who know how to use them by bringing to public affairs a spirit of wisdom, justice, and forbearance These qualities have never been wholly wanting in our past If we cherish these qualities, our future may be as glorious and even more happy

Let me add one further word It is nearly a century and a half since Edmund Burke thought fit to write that the age of chivalry was gone "The unbought grace of life, the cheap defence of nations, the nurse of manly sentiment and heroic enterprise," he said, "is gone" Whether those words are wholly true to-day, every man may consider for himself But if indeed the "cheap defence of nations" can no longer be wholly counted upon—if the respect and the admiration which a country enjoys among its neighbours afford no longer a sufficient means of safety—it is obvious that some further and additional means of safety must somehow, at whatever cost, be provided Yet the fact remains that armaments, and re-armaments, can never in themselves be enough The moral which Sir Francis Doyle pointed, from the immortal story of the Private of the Buffs, has never lost, and can never lose, its force —

> "Vain, mightiest fleet of iron framed,
> Vain, those all-shattering guns,
> Unless proud England keep untamed,
> The strong heart of her sons"

That is the spirit in which we are to march to whatever conflicts may await us "in perfect phalanx to the Dorian

mood," and it is because of that strong and untamed heart that we may drink with confidence the toast of the lasting concord, freedom, happiness and glory of this Empire, all of which and more are expressed in the incomparable word "England"

VII

THE BUD OF LIBERTY[1]

MR PRESIDENT, my Lords, Ladies and Gentlemen,—There is to-night conferred upon me the honour—the signal honour—of responding, or trying to respond, on behalf of England You remember that Keats, when he first looked into Chapman's Homer, was impelled to think of Cortez as he gazed upon the Pacific, " silent upon a peak in Darien " Somehow it did not occur to Cortez on that occasion to make a speech Nor was there ever a moment when, for my part, I felt more keenly than now that, if speech is silver, silence is golden I might indeed, when I am called upon on behalf of this particular client, exclaim with Wordsworth —" Milton, thou should'st be living at this hour, England hath need of thee " Indeed, in order to do justice to the theme, a man would need to be equipped not only with the mind of a poet but also with the memory of an encyclopædia Happily there is no need to be exhaustive An exhaustive speech, or an exhaustive argument, as you know—I mean, of course, as you have been told—is one which exhausts the hearer Now, it seems still to be the fashion in certain quarters to sing the praises of every country except one's own We have not yet entirely got rid of

> " The idiot who praises in enthusiastic tone
> All centuries but this, and all countries but his own "

[1] Speech at the dinner of the Royal Society of St George, Cardiff, 18 October, 1935

I shall not be tempted into any such eccentricity Englishmen are proud of England For those who have been trained in English schools and English universities, and who have done the work of their lives in England, there are few loves stronger than the love we have for our country When we consider other nations, when we judge the merits of the policy of this country or of that, it is the standard of our own country that we apply There is no arrogance in this frame of our mind, whatever the school inspector may say Bred and trained in England, we have our own notions of what is fair and right The long traditions of English education, government, and law have had a profound influence upon our estimate of what are called spiritual and moral " values " —an influence which we could not escape if we would, and would not escape if we could Loyalty, courtesy, tolerance towards opponents,—these are some of the virtues upon whose importance the English system has laid special stress We have been taught that certain standards are correct, and by those standards we judge men and things Returning from journeys abroad we cannot refrain from comparing what we have seen with what we find awaiting us at home And, as no doubt in this matter we are partial, our finding is in England's favour It may be that our buildings have failed to reach a spectacular height It may be that our illuminated advertisements exhibit a less ferocious glow It may even be that we have not accepted the pure milk of the word about macaroni, spaghetti, or chianti But there is a comfort and a sanity about the English scene which, frankly, we do not find elsewhere Very near to admiration, no doubt, is the wish to admire But it is natural for us to regard our country, as the greatest statesman of ancient Athens believed to be right, not

only with effortless enthusiasm, but also with the unsought ardour and constancy of a lover

Liberty, moreover, has made her abode in England England is the home of democratic institutions—that is to say, of the system of government which makes every citizen responsible England is, in John Bright's phrase, the Mother of Parliaments To-day, wherever the English language is spoken, men and women enjoy the priceless blessings of liberty of speech and action True, we owe much of this heritage to writers and thinkers in other lands,—to lovers of liberty in nearly all the countries under the sun But the development of Political Liberty needed two conditions Freedom had to be planted in hospitable soil, and its growth required sustained vigilance to the end that the plant might be nourished until it grew to strength England provided these two essential conditions The bud of Liberty opened in an English spring To-day democratic institutions are under fire all over Europe and the elementary liberties of speech and movement are being flouted The persecution of minorities—that easy pastime—is being widely pursued The free expression of opinion is being crushed by censorship and control Free action is stifled in a party uniform These insidious influences have hitherto hardly penetrated into England It is true that in our midst there are many enemies of liberty—some of them, perhaps, in rather unexpected quarters But we are standing firm It has been said that an Englishman's Home is his Castle The home of Liberty is in England And it is a castle indeed—a castle that will be defended to the last To-day the influence of England, widespread throughout the world, penetrates and permeates by peaceful methods It was not always so St George did not subdue the dragon by means of economic

sanctions Unless my memory is at fault, the wars of ancient days between English Lords and Welsh Lords were contested with other weapons than embargoes and boycotts Against Wales the Englishmen of those days took warlike measures If Wales declined the choice fare of English administration, was there not much to be said for forcing the good food down the throats of our neighbours across the Marches? It proved to be a hazardous adventure It would be a strong thing to say that it succeeded But all that is now remote history To-day there is no more popular name in England than the Prince of Wales, nor can it ever be forgotten that, in the hour of gravest crisis, England and the British Empire entrusted leadership to a fearless statesman from Wales—born in Lancashire

It is natural to refer to the leadership which England has created for the world Yet the English people, who have fashioned these great instruments for human government and welfare, are a peaceable people They are not hustlers Sometimes they appear to be more really interested in the result of the village cricket-match than in a vital decision upon foreign policy Perhaps the average Englishman does not readily take the long view But, if he is inclined rather to face circumstances as they arise, he has hitherto muddled through astonishingly well The quiet good humour, the serenity of the English people—these things may not be the creatures of the English landscape, but they are greatly aided by it I shall not attempt to describe that precious gift If we wish to read of the exquisite beauty of our land, we must turn to Milton and Keats You remember how Rupert Brooke, who was so soon to die in a foreign field, sitting amid the heat and noise of a Berlin café in 1912, cast his mind back to the fields of Cambridgeshire

and the vicarage at Grantchester In the formative years of English youth, the gentleness and the peace of England's landscape undoubtedly exert a profound influence Where other men might be tempted to flush with anger, the Cockney, the Lancashire man, or the west-country man is rather inclined to smile He is more disposed to amusement than resentment Yet Englishmen have proved themselves strong and even fierce when any encroachment upon their liberties or their territory is threatened Twist the lion's tail, and he roars For if the qualities which we prize include generosity and tenderness, they give first place to strength and pluck Yes, we are greatly blessed, we Englishmen What Edmund Burke wrote was true of his own time, it is true to-day, and it will be true in the future — "The King, and his faithful subjects, the Lords and Commons of his realm—the triple cord which no man can break"

VIII

THE CORONATION[1]

"GENTLEMEN, 'The King'!" This loyal toast, never acclaimed with more heartfelt sincerity than to-day, is usually submitted in respectful silence The speaker, for excellent reasons, refrains from words even of good omen Words of enthusiasm might perhaps be mistaken for sycophancy, and the voice of severe restraint might possibly be construed as indifference But at a wholly exceptional moment the rule of silence is thought not to apply

Everybody knows—if feeling is evidence—that the great event of Coronation, at once so splendid and so significant, is not an occasion for mere words Perhaps there have been quite enough words already It is, the good citizen may think, an opportunity not for the oratorical pyrotechnics of an hour but rather for the actual devotion of the whole conduct of life Rarely before in living memory has any man witnessed so spontaneous and so widespread a demonstration of the profoundest feelings of loyalty, of respect and of confidence, or more manifest signs—encouraged no doubt by certain special circumstances—of the mood of co-operation and goodwill

Perhaps it is lawful at such a moment for Englishmen to exhibit the ancient virtue, now somewhat neglected,

[1] 12 May, 1937

of those who think themselves worthy of great things, being worthy

" When ", wrote the then Warden of All Souls half a century ago, " we contemplate our institutions in their " monumental dignity, and the world-wide span of our " Empire, it is well to remember the patience and courage " of our forefathers and the long line of Kings and " Queens and statesmen, often conspicuously great in " force of purpose and vigour of intellect, to whom we " owe what we now possess " To-day, it is not too much to say, the universal belief prevails that King George the Sixth, in force of purpose and vigour of intellect, will maintain the high tradition bequeathed to him by George the Fifth

The act of Coronation, as everybody recognises, is the public, ceremonial and solemn ratification of those bonds of consent which unite a Constitutional King and his loyal subjects Moreover, in point of significance, the present event is strictly without parallel For those loyal subjects include not only the millions of devoted citizens at home, and not only the many more millions of devoted citizens throughout the far-flung Dominions, but also and for the first time the citizens of Dominions now firmly placed upon a footing of acknowledged and permanent equality It would, of course, be idle to pretend that the institution of monarchy has been, at all times and in all respects, uniformly and certainly secure in this country There have undoubtedly been moments of difficulty and some apprehensiveness Even within the memory of persons now living there have been voices—not many—which professed that loyalty to the throne was no more than a degenerate worship of wealth and social status, and that the chief requisites for the throne itself were an amiable disposition and the capacity

for being stared at with equanimity. But those voices have been hushed, and hushed by the best of all processes —the force of events and the appreciation of the truth It is a commonplace to say that the essential strength of the monarchy in England was never more firmly established than at the present moment in the disposition, the determination, and the true allegiance of the public The prevailing good sense of the English people is deeply rooted in a sense of fairness If there have been circumstances, not to be unnecessarily dwelt upon, which preceded the sudden accession of King George the Sixth, they are manifestly regarded by good citizens as constituting an added and powerful incentive to leave nothing undone which a loyal devotion can suggest in order to make his path as little arduous as may be It is amid a profound sense of public gratitude that the King, keenly alive as he is to the majesty and responsibility of his office, becomes the trustee of the noblest traditions and the proudest heritage which the world has ever known

" Certainly ", says Francis Bacon, " great persons had " need to borrow other men's opinions to think them- " selves happy, for if they judge by their own feeling they " cannot find it " Yet perhaps it is not idle to fancy that some satisfaction, at any rate, is to be gained from the assured knowledge of widespread goodwill It used to be said that one indispensable qualification for the office of Prime Minister was that a man should not desire it To succeed to an office of vast importance suddenly and unexpectedly, and with no other wish than to fulfil its duties and to maintain its traditions, may be no inauspicious opening of a new and momentous reign Nor let it be supposed that the unparalleled brilliancy of this Coronation, and the joyous applause of all sorts

and conditions of men, represent nothing more than an inviolable attachment to a symbol or an emblem of stable institutions They represent also a profound regard for the person of the monarch who is now called to so tremendous a task, and for whom in that sphere, no less than in the British Navy, personal qualities of strength and courage are essential

Nor let it be supposed that the task of a constitutional King is merely formal or ceremonial Gradually the public is coming to realise that the once unpopular word " democracy " is not the name of a section of the population, nor of some sort of fancy religion, but is the name of a form of government in which every citizen has his share of responsibility Those who know how to fulfil their own responsibility are ready and willing to appreciate the responsibility of others They know that in politics, as in physics, where there is no resistance, there can be no support They know that the King can appoint and dismiss Ministers, that he can dissolve Parliament, and that he can refuse assent to any Bill which Parliament has passed They know something also of the incalculable influence which he can at all times exercise But they know also that his authority will be used with balance and wisdom, and they look forward with confidence to the future, believing as they do that the glory of a country, as of an individual, consists not in wealth and strength but in justice, in moderation, and in nobleness of temper

IX

A HOPE FRUSTRATED[1]

"FAIR is the prize and the hope great" There are probably few persons who, of their own knowledge, remember four accessions to the Throne of England, but there are undoubtedly many who have, as the present writer has, a vivid recollection of three, and if one of those persons is invited to consider for a moment the task that falls to King Edward VIII his mind must instinctively turn to the well-remembered words of Dr Johnson "It was not for me to bandy words with my Sovereign" His Majesty the King, however, within a few hours after succeeding to his unique responsibilities, described in clear words the nature of the goal to which he looks forward He declared that he was resolved to follow in the footsteps of his father Those words, in their immediate context, had special reference to the duty of upholding the Constitution But in their wider, and obvious, implications they may be thought to exhibit a complete and unrivalled code of kingship

It was said, and said truly, in the celebrations of the recent Jubilee, that no King ever before so loved his people and no people ever before so loved their King And if there were to be collected, even from the utterances of the last ten days, the manifold gifts and qualities observed in one who chose to be counsellor rather than

[1] 30 January, 1936

ruler, and preferred the voice of friendship to the tone of command, there would be brought together a catalogue of active virtues almost, though not quite, beyond the power of mortal man to emulate Perhaps the sum of the matter is expressed in a notable sentence of the Prime Minister's "As the knowledge of the King's complete dedication to duty grew and spread as his reign proceeded, so did the respect of his people turn into reverence, and reverence into love, it is literally true that he won their hearts"

The high places of the universe are, and must be, solitary

> "The solemn peaks but to the stars are known,
> But to the stars and the cold lunar beams,
> Alone the sun arises, and alone
> Spring the great streams"

Yet the greatness of King George so remembered to be king as never to forget that he was a human being His successor has already offered many proofs of the like temper Not by accident, but deliberately and of design, he has made himself known to all sorts and conditions of men, learning at first hand their sorrows and their joys, and bringing to the trials and tribulations of their daily toil the unequalled charm of personal contact A dozen years ago a speaker at one of the festivities of the Royal Society of St George ventured to say that the President of the Society—then Prince of Wales—was "by universal consent *facile Princeps*" The King is above party (if indeed party any longer exists) and a stranger to bias and prejudice Exercising with restraint the vast and undefined authority of the Crown, he is not likely to lack opportunities, whether at home or abroad, for that invisible cement which means so much to the stable fabric of society Nobody indeed is so foolish as to

imagine that the times are, or will be, easy But it may be hoped, not without reason, that there is not lying in wait for the King any repetition of the apparently unending series of crises, foreign and domestic, which clothed the late reign with too much history It is not convenient even to enumerate possible sources of difficulty Yet it may be well to remember that, as every student of constitutional law is aware, there is a real and close association between the prerogative of the Crown and the problems of peace and war At home, indeed, the signs at present appear to be favourable for something like that union of good citizens—that *concordia ordinum* —which some at least of the wiser heads of the ancient world desired, but desired in vain Nor does it need a Whip to perceive that it is no small thing to make men be of one mind in a House But abroad it is apparent that clouds are gathered, or gathering, in more than one hemisphere

In the old days there was a virtue, named by men "sophrosyne", which made it easier for the other virtues to do their work Is not that a kingly task? The maxim "The King can do no wrong" means, no doubt, that for every act of the Crown some Minister is in law responsible But the notion that, therefore, the King has no initiative and no responsibility is a thing which is manifestly at variance with notorious facts In counsel, in policy, and in the choice of men there is ample scope for indefatigable industry, allied though it be with an invincible modesty It is to be regretted, however, that the world of after-dinner speeches—a long-suffering world—must henceforth be the poorer When the King was Prince of Wales he had, as everybody knows, the art of weaving into a prepared speech a thread of glittering impromptus There must be many

who remember, for example, how that at an imposing feast of physicians he observed an incompleteness in the account that was given by a learned professor of the antiquity of the medical profession "Did he really do justice to his theme?" the Prince asked "I always thought you went back at least to the Garden of Eden Was it not there that Eve began to teach Adam the valuable lesson—'an apple a day keeps the doctor away'?"

It was Catullus—was it not?—who included among his wishes, "*nec tam doctissima conjux*" Perhaps it is with kings as it is with wives—that they should not be dungeons of learning It is more to the purpose that the ambassador of Empire should also be a true sportsman—the exemplar of that true sporting temper which the public likes to think, and is satisfied to know, is typically and essentially English It is in that temper that so many millions to-day ardently hope that the King may have long to live in health and wealth, prospered with all happiness, well assured as they are that the safety, honour and welfare of his Dominions are in his hands secure

X

THE DUKE OF KENT[1]

MY Lord Chairman, your Excellency, my Lords and Gentlemen,—There is conferred upon me to-night the high honour of proposing the health of our welcome guest, H R H The Duke of Kent Like a famous traveller of an earlier day, His Royal Highness has seen the cities and has known the minds of many men But the present Odysseus observed the excellent plan of taking the Lady Penelope with him, and of bringing her safely home to share his welcome and to heighten his joy Perhaps you will allow me to add, especially after the words, the very kind words, which have fallen from Lord Derby, that on this topic at any rate I know what I am talking about

Gentlemen, most of you, of course, remember that Francis Bacon, in his bright little essay "Of Travel," after enumerating no fewer than thirty-seven things or classes of things to be seen and observed by persons travelling, says "as for triumphs, masks, feasts, weddings, funerals, capital executions and such shows, men need not be put in mind of them, yet are they not to be neglected" You perceive the artfulness with which the cunning author of the *Novum Organum* arranged his words in that agreeable sentence Weddings, you observe, are immediately preceded by masks and feasts They may be followed—though not, to be sure, in every

[1] Speech at a dinner of The Pilgrims, 30 April, 1935

case—by funerals, and even by capital executions Our Royal Guest has not, or at any rate has not yet, been called upon to undergo the last ordeal But no attentive student of the records of his strenuous tour in South Africa is likely to forget that Prince George, as some of us still like to call him, was on a memorable occasion saluted by one of the Chiefs, according to a trustworthy estimate, at least 215 times And it was after that experiment or experience that our Guest nevertheless declared, in the language of that country, that "All will come right," and reiterated his admiration of "co-operative effort in the present" and of "faith in the future" Mr Chairman, what an edifying co-operative effort it would be if here and now all of us were to stand and salue the Royal Pilgrim 215 times And we may be quite sure that, if that number, or even ten times that number, of salutes were really necessary in order to give spontaneous expression to the loyal devotion of a high-spirited and independent assembly, the demonstration would not be shirked

But, Sir, salutes may be long, and life and banquets are fleeting You may recollect that, in another immortal essay from the same pen, we are told that "princes are like to heavenly bodies, which cause good or evil times, and which have much veneration but no rest" The Prince whom we entertain as our honoured Guest to-night has happily caused no evil, but only good times Few men have had more veneration, and few so little rest Observing always the splendid traditions of the Royal Family, he has never for a moment been content to pass his time in lethargy His activities and his achievements are beyond number It may be that some of us recall with particular delight his happy association with the Royal Navy For my own part—and I am

proud to speak as one of His Majesty's Judges—it is very pleasant to remember that, in the course of his career, he has somehow found time to be called to the Bar and to be a Bencher of his Inn of Court The welcome which to-night we offer, with the greatest respect, to the Duke of Kent, is all the warmer because the primary aim and purpose of this Society is to promote good understanding and friendship among the English-speaking peoples of two hemispheres, and thereby to conduce to the reign of justice and freedom, peace and goodwill, among all mankind

Sir, it is no part of my duty, nor of my inclination, to heap unmeaning praises upon him Rather I am disposed to say "*res ipsa loquitur*"—which is all that the Common Law of England knows about songs without words Everyone is well aware that no body of men and women has done more than our own Royal Family, to our everlasting gratitude, has done in order to promote the cause which this Society has at heart Our Guest belongs to that charmed inner circle that shows the whole world how fortunate the citizens of this country and of this Empire are in having, as sons of His Majesty the King, Princes who have proved and are daily proving that they are able and willing to undertake and brilliantly to discharge public services of high importance Sir, they go about doing good We all remember how happy and how successful were the results of Prince George's visits to Canada in 1927 and to South Africa in the spring of last year Now he has just returned from a visit to the West Indies The occasion of this latest journey was rather different But we are entitled to reflect that to Princes alone is reserved the privilege of combining a honeymoon with an effective and popular 'diplomatic mission We must not forget, and on this occasion we do

honour to, the unceasing industry and unselfishness which these various activities and journeys necessarily presuppose There is no more exacting task Yet in the demeanour of our Guest there is never apparent any trace of fatigue Very soon he will take up, at Holyrood Palace, his new duties as His Majesty's Lord High Commissioner to the General Assembly of the Church of Scotland In that place, appointed as he now is to be a Knight of the most Ancient and Most Noble Order of the Thistle, it will be strange indeed if his Scottish neighbours do not discover, as they discovered some time ago of William Shakespeare, that, though not a Scotsman, he has at any rate " a' the genius of one "

We are all greatly delighted to learn from our Chairman this evening that the Duke of Kent has consented to be enrolled a Pilgrim A few months ago His Royal Highness, the Prince of Wales—*facile Princeps*, as I have more than once dared to describe him—said that he was proud to have been elected an American Pilgrim before he was elected a British Pilgrim With the greatest respect, I am not at all sure that, in making that statement, the Prince of Wales was quite right in his law The principle of our Constitution is, I understand (and in any event I am prepared to rule), that there is no room for priorities or preferences in the election of Honorary Members, and, on the contrary, that an Honorary Member elected in the United States becomes instantly and *ipso facto* a member of The Pilgrims in this country and vice versa It follows, does it not, that as our Guest has accepted membership here, he has at the same moment become a Pilgrim in America And I hope the inference may be drawn that he will, without any avoidable loss of time, visit the United States, where it is quite certain that a warm welcome awaits

him Always indeed, but especially at the present hour, British citizens everywhere are reflecting how great a debt this country owes to our Royal Family But respect for the way in which the King and the Queen have worked to help this country is not at all confined to the British people alone It is acknowledged in all parts of the world, and in honouring the Son to-night we pay homage through him to the Father and the Mother Let me add in the name of every one who is here that, on the occasion of her taking up residence in London, The Pilgrims offer the heartiest welcome and the best wishes to the Duchess of Kent Our greatest poet may remind us that we can all claim to have something in common with the Duchess

> "Such duty as a subject owes the Prince—
> Even such a woman oweth to her husband"

Sir, I will end as I began these too hasty impromptus Our Guest has come back to home, sweet home And he may perhaps reflect, in the scarcely altered words of Catullus, "Can there be a greater blessing than when the cords of care are snapped and the mind lets slip its burden—when, spent with toil in far-off places, a man comes to the sanctuary of his home? This moment is cheaply bought even by such costly pains Welcome, lovely Kent! Make merry before your master Make merry, too, ye waves of the waters of the Channel, and let every jocund echo with which home is haunted break into smiles" Gentlemen, there is no need to say that we are all greatly honoured and delighted that the Duke is with us to-night In the name of all of you, and with the greatest goodwill, I wish him long life and every happiness, and I give you the Toast of his health

XI

THE PURITAN TRADITION[1]

YOUR Excellency, my Lords, Ladies and Gentlemen,—At various moments in this exciting day I have been reminded of successive occasions when it was my good fortune to learn something of the minds and the men of America First of all, at the mature age of six or seven years I was invited to read, and did read, a valuable article, some parts of which have always lingered in my memory The writer began by saying that it was only in America that men were so short that they had to go up ladders to shave themselves, and it was only in America that men were so tall that they could put their arms down the chimneys and open the front door from the inside A little later he said that it was only in America that men never went out to shoot except with the long bow, and finally he added that it was only in America that every man in the country was undoubtedly one of the most remarkable men in the country A few years afterwards my American uncle, then a professor of history and philosophy in one of the great Universities of the United States, paid a visit to England and not only enriched me with a highly acceptable present but also revealed to some of us in the City of Chester, which I thought I knew very well, a remarkable series of unsuspected relics and legacies of the Roman occupation Meantime I had

[1] Speech at the American Banquet, Thanksgiving Day, 1935

begun to make the acquaintance of that priceless humourist, thinker, and literary artist the centenary of whose birth will be reached in the course of a few more hours It is a red-letter day in the life of an English boy when he begins to come to terms, for example, with "The Innocents Abroad," "Life on the Mississippi," and the immortal "Huckleberry Finn" And it was, I fancy, a red-letter day in the life of Mark Twain himself when, on his arrival here in London on that day in Ascot week when the Gold Cup was stolen, he found that the contents-bills of the evening papers contained nothing except the words "Mark Twain arrives Gold Cup Stolen" Bret Harte, Lowell, Hawthorne and many another carried on the elementary education which Mark Twain had begun, and from them, as well as from Bryce and Holmes, I had really begun to learn a tiny fraction about America when, on a day memorable for all of us, there came to London as Ambassador a former Solicitor-General, Mr John W Davis I must not heap unmeaning praises upon him But it is not the fault of that inspiring and illustrious man, nor of men like Mr Page and Mr Hughes, nor yet of the American Bar Association, if Englishmen at home remain ignorant of the best side of American life and thought In New York and in Buffalo, as well as in London, it has in recent years been my happy fortune to meet other brilliant ornaments of the American Bar, like Mr William D Guthrie and Colonel George Burleigh, and who can attempt to express or assess the incalculable debt we owe to that delightful and ever youthful association which is lucky enough to have Lord Derby for Chairman and Sir John Wilson Taylor for secretary—I mean of course "The Pilgrims"? At the meetings of that great organization a man easily

learns—not indeed that blood is thicker than water because that obvious lesson needs no learning—but rather that America and England are in many vital matters in agreement, not because they have quite the same views, or think quite the same thoughts, or even speak quite the same vocabulary, but precisely because, while they differ to some extent in all these things, they are like brothers in one and the same family and respect each other for their differences

On Thanksgiving Day it is natural to recall to mind the great journey of the Pilgrim Fathers Many Americans, I believe, claim to be descended from the Pilgrim Fathers—so many indeed that, if all the claims are well-founded, the "Mayflower" must have been at least as big as the "Majestic" But the whole romance of the adventure lies in the fact that the vessel was small and the journey hazardous beyond imagination Is it not indeed cause for thanksgiving that that great enterprise did not end in failure, and that these heroic travellers upon their arrival discovered the means to sustain themselves and to found their colony? There have been, since that day, many careers of high adventure in the United States Men have won their way from humble beginnings to positions of eminence in business and in statesmanship There have been the careers of those adventurous men who were the pioneers of expansion towards the West But probably no effort has been more heroic, nor the source of more undreamt-of events, than the voyage of the "Mayflower" The great buildings of Manhattan,—those towering monuments to the enterprise and the courage of the American people—serve as memorials not only to initiative and progress in recent days, not only to the great names of American history like Washington and Lincoln, but also to that

small band of brave persons who first, by dint of a courage and patience that stagger the imagination, made possible the whole subsequent history of America

It may be thought, perhaps, that a country which has studied more than most others the science and the business of commercial advertisement has hitherto in a singular degree failed to advertise its own merits The most harmful caricatures of American life are offered to an older civilisation for its amusement The films which are exported from Hollywood, for example, seek to convey the impression that the American people are a hectic community who never tire of disporting themselves at gatherings of a strange and audacious kind In fact, of course, the reverse is the truth Probably we can never arrive at a proper understanding of America unless we recognise that it is, more than any other country, the depositary of the Puritan tradition So ineffectual do the Americans seem to be in the art of self-advertisement that a mere Englishman might expect the Eastern States to be a hive of armed and masked gangsters, emerging from ancient timber-houses which had been transported bodily from Devon But here again he would be sadly wrong If Cromwell were alive to-day, seeking to find the company most congenial to him, he would probably find it in the fortieth story of an apartment-building in New York, equipped with the most modern aids to comfort Is it not quite clear that the secret of the strength of the American people is to be found, not in records of height, speed, or output, made to be broken, but in the Puritan tradition which it cherishes and which was made to last? The dazzling journey from Haarlem to Hollywood provides less enlightenment to the student of American life than the more painstaking progress from Log Cabin to White

House In point of geography America is happily remote from the crises which recur in Europe Yet the peace of the world must be her first concern In 1918 she sent her armies across the sea to fight in the War that was to end war She can certainly be trusted to be vigilant in ensuring that that historic journey was not made in vain Within her own boundaries she contains a precept and an example for European statesmen Immigrants from all lands under the sun live together in peace No difference of race or colour is so fundamental as to disturb united loyalty to the flag of the Republic Moreover, the boundary between the United States and their great neighbour, Canada, may well serve as a reminder to European statesmen that bombs, gas, and howitzers are not the best guarantees of security It is the hope of many people in England and, I believe, in the United States that the two countries may fully co-operate in advancing the great cause of Peace We live at a time when Peace is once again endangered and when, not for the first time, democratic government is being assailed in many parts of the world At such a time must we not remember our great common traditions? Whatever our differences in the past, however much our courses in history may have diverged, may we not now reflect that the wisdom of Jefferson and Chatham, of Washington and Burke are our common heritage? And should we not together seek to advance the cause which men like these had at heart? Let me conclude in the words of that distinguished American statesman and lawyer, Mr Elihu Root —"The lessons of the war are not lost, but in the distressing circumstances which have followed it they have ceased to be felt and to be applied The lessons of the brotherhood of man learned on the fields of France and Flanders,

Italy and Poland, and the Russian frontier—the lesson of universal condemnation of ruthless and brutal greed for power, the lesson of the underlying nobility in the plain people who met there for the first time to risk and to give up their lives, the beauty of service and sacrifice—these are not forgotten and they will not be They will all remain in the consciousness of the world "

XII

NATIONS—OR HALLUCINATIONS ?[1]

IN August, 1914, a few days after the outbreak of the Great War, a certain King's Bench Judge and a King's Counsel were attempting to play a game of golf on a romantic course in Cornwall Neither of them had ever been a " star performer," but on this day their golf was worse than usual They were absorbed in the maxim or prediction, which had then become current, that the war was a war to put an end to war But how was this glorious consummation to be attained ? Each of them thought that somehow a vast edifice of agreement, going far beyond the Concert of Europe, must be built up But how if the agreement failed to be universal ? What was to be done with Powers and potentialities that refused to bind themselves to refrain from war ? And how if, among those who did in fact agree, there should prove from time to time to be backsliders ? By what means and by whom were offenders or deserters to be controlled or corrected in order that the Concert of World-wide Peace might prove enduring and strong ? Soon the question arose What is the good of a judgement unless in the last resort there is a sheriff's officer to execute it ? Was it, then, useless to think of a universal agreement for peace in the absence of some reservoir of force in the background to ensure that its decisions might prevail ? And if force there must be, who was to control

[1] February, 1937

it—was it to be one combined international force under the control of the whole body of those who agreed, or was it to be a force made up of individual units, each under the immediate control of one of the consenting Powers, although subject to the overriding will of the organisation acting as a whole? But if these separate units of force were to exist, what was to prevent a new grouping of Powers according to their interests, aims, and perhaps rivalries, and must not the world before long slip back once more into the abyss of competitive armaments and rival associations? Or was it too much to hope that, somehow or other, peace might be preserved in the pure spirit of peace, and by means essentially and wholly pacific? Could the hardness of men's hearts permit the realisation of such an ideal?

The scene shifts to Paris, in the early months of 1919, where, from morning to night, and well into the night, many delegates and their friends, representing or misrepresenting many countries, were endeavouring to hammer out the document which in the middle of that year became the Treaty of Versailles That memorable document had a tolerably mixed reception, except perhaps in Oxford, where the reception was almost entirely hostile Many persons have heard the story of the brilliant tutor in history, who was also chaplain of his college, and his conduct of the service in the college chapel on the Sunday which followed the publication of the Treaty When he came to the passage where, according to the regular service, the parson beseeches the Almighty to "give us that peace which the world cannot give," by a mere slip of the tongue he substituted the words, "Give us that world which the Peace cannot give" Yet, when all subtractions have been made, and all criticisms have been considered, it seems true to say

that the Treaty of Peace, in the atmosphere of 1919, might easily have been a good deal worse

Some day—not yet—perhaps the time may come to tell the unvarnished story of the negotiations for the Peace No chapter will be more interesting than that which describes the conflict of opposing views on the 14th of President Wilson's " fourteen points," which was in these terms

" A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike "

To pass over minor differences, a great difference of opinion speedily disclosed itself upon the question whether this general association of nations should be a loosely-knit organisation, designed (as circumstances required) to bring the nations together in conference, with the view first of putting off and secondly of resolving any critical question, or whether, as the expression " under specific covenants " seemed to contemplate, it should be a closely-defined society, subject to the individual enactments of a more or less elaborate code It is not necessary to inquire at the moment what precise contribution was made by President Wilson himself to the settlement of this fundamental question But in the result there came at length into being the Covenant of the League of Nations, with all its apparatus of twenty-six articles, defining the obligations of the High Contracting Parties, and prescribing the constitution and the machinery of the League

Everybody is supposed to know, and a few persons undoubtedly do know, what these articles contain and provide By Article 8, for example, the Members of the

League "recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations" The words of Article 10 are the following —

"The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled"

The next Article declares that "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is a matter of concern to the whole League and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations" By another Article the Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council Afterwards Article 16 sets out the detailed scheme of consequences and penalties in any case where a Member of the League resorts to war in disregard of its convenants The offending Member is *ipso facto* to be "deemed to have committed an act of war against all other Members of the League," and they undertake "immediately to subject it to the severance of all trade or financial relations" and the "prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State" Moreover it is, in such a case, the duty of the Council "to recommend to the several Governments concerned what effective military, naval, or air force the Members of the League shall

severally contribute to the armed forces to be used to protect the Covenants of the League "

Now, in the years which have passed since the League of Nations was created, it is a melancholy fact that, while it has achieved some minor successes, it has exhibited some grave failures and caused much disappointment Whether this comparative lack of success is due to the excessive elaboration of the League's system, or whether it simply means that too much is expected of it, it is not easy to say To-day, at any rate, while plans are understood to be in progress for the amendment, or at least the alteration, of the League, two distinct voices are heard One voice says that the League ought to do more , the other says that it ought not to attempt so much Not many days ago a document which appeared over some well-known names declared that " War can be averted and a stable peace permanently maintained if the nations which are Members of the League will now make plain their determination to fulfil their obligations under the Covenant and to take any measures required for the prevention or repression of aggression, including, if necessary, military action " These are, at any rate, brave words, and the signatories went on to affirm that " If the Members of the League are united in this policy their joint strength will be so overwhelming that no intending aggressor will venture to refuse the settlement of disputes or other outstanding questions by peaceful means " It is indeed a happy thought But, unfortunately, the whole strength of the sentence is conditioned by the word " if "

When people reflect upon the amazingly difficult circumstances in which the League has to work, the surprise may rather be not that it sometimes fails, but that it ever succeeds How it is possible for difficult and

delicate negotiations to be brought to a successful conclusion in an atmosphere of oratorical pyrotechnics, and amid the discordant cries of rival performers and their partisans, one fails to understand It is tempting sometimes to think of the League of Nations as a modern version of the mediæval Church, where the penalties called "sanctions" are really a form of excommunication But, if a universal Church, with all the tortures of Hell and all the rewards of Heaven under its control, as was then believed, nevertheless failed to maintain its secular power, is it reasonable to expect that any incomplete and secular League, with its sanctions on mere trade, can permanently maintain its authority? Is it not right and prudent to set about the task with modesty as well as with courage?

The world seems to have been half mad in 1919 The victors in the war appear to have thought that the conditions which existed at the moment of victory could be crystallised for all time Those who seemed to have complete power in their hands could not, at the moment, bring themselves to think of change But the sequel was disappointing First of all, America went out, and is it too much to say that then France sought to use the League in order to maintain a policy of ascendancy which, in the nature of things, it was beyond her power indefinitely to continue? Germany was admitted to the League only to drop out, especially as, in the view of many careful observers, the League was based upon a Treaty which proposed permanently to stereotype the penalties of defeat Russia, for her part, seemed to come in largely for the purposes of the quarrel between Slav and Teuton, which yielded the immediate occasion of the Great War

It seems pertinent to ask whether it is possible to contrive a successful League of Nations which does not

in some way recognise change as a constant and inevitable feature of human affairs Is it not elementary that law which cannot change cannot command respect for ever, but, however just it may be at the beginning, is bound, sooner or later, to be merely another word for injustice ? There are, as every schoolboy knows, only two sanctions of law One is force, which in international affairs means war, the very thing that the League of Nations was set up to prevent The other sanction is consent, and it is easier to get consent locally than universally Consent has been obtained in the municipal law of an individual State—subject, no doubt, to riot and occasional rebellion, and this consent becomes, to a great extent, a matter of police Yet it may be possible to secure consent as between two or three nations with reference to the law which locally they will jointly enforce, and it may be possible to secure consent over the whole world with reference to certain fundamental interests of humanity But, as things stand, there seems to be little prospect of universal political consent, and, if that be so, prudence suggests that a beginning should be made where consent is possible, and gradually extended from one district to another and from one class of subject to another In other words, it may be that the right basis is what is called the regional system If it is possible to set up a general Areopagus to advise at first and afterwards perhaps to legislate, so much the better But, if that institution is to be equipped with compulsory powers, those powers may easily destroy it

There are those who say that peace and war are " all one " But if that statement were true (except merely in the sense that everything is all one) it would mean that, if any country has been foolish enough to go to war, all countries are compelled to be equally foolish

A little reflection may suggest that the habit of minding one's own business is one of the major political virtues In theory, no doubt, the idea of an international police force is quite attractive But upon examination it is seen to presuppose a universal State, which does not in fact exist Nor do men build a house from the roof downwards Moreover, the primary object of a League of Nations being to prevent war, men naturally ask if it is not somewhat perverse that such an institution should contemplate the use of the very force that it was intended to supersede The objection to force is not, indeed, that it necessarily leads to injustice There are those who think that if a nation cannot defend itself it had better not exist Perhaps the true objection is that force offers no guarantee of justice, and that at best it is a clumsy way towards that end Of all institutions in the world is it right that a League of Nations should think of employing force? Pacifism is, to be sure, illogical and indefensible in the citizen of an independent State For either it denies the right of the State to exist—the State which nevertheless the pacifist continues to enjoy—or it is a mere shirking of his duty But in the case of a League of Nations, on the other hand, it may well be said that pacifism is its first duty inasmuch as its ends are pacific and its means ought to be pacific also

XIII

A PEEP AT PARLIAMENT[1]

AN Englishman's first visit to that generous and delightful assembly, the House of Commons, is or ought to be to him an interesting event in his life He sees at work what he has so often read of and thought of, the Mother of Parliaments, the great representative House of a free people in a true democracy —a system of government, that is to say, under which every citizen in the State has his individual share of responsibility, and every Minister of the Crown may be called daily to account

Let me say at once, and with all possible deference and humility, that my first sensation was one of acute disappointment, but of disappointment afterwards to be completely and everlastingly removed It was on Tuesday, the 9th February, 1892, now forty-five years ago, that I first saw the inside of the House of Commons With what expectation, and indeed excitement, I went there, it is not necessary to attempt to express Having had the great good fortune to be born in Bury, Lancashire, a constituency represented for some years by Sir Henry James, who was Attorney-General in a famous Government of Gladstone's, I had been brought up in an intensely political atmosphere and had listened in my 'teens to nearly every one of the political leaders of the time But I had listened to them in the excitement of

[1] January, 1937

crowded public meetings, and at first the House of Commons seemed to my partial and remembering eyes to be a much tamer and less thrilling place

Yet I was fortunate in my first sight of it A kind member had found for me a place under the Gallery, from which it was easy to see and to hear Sir Charles Russell, as he then was, was speaking in the debate on the Address The Leader of the House, A J Balfour, earlier in the evening had been rebuking Sir William Harcourt for his criticisms of a speech which had then recently been made in Exeter by the Prime Minister, the great Lord Salisbury Sir Charles Russell protested against the view that "an ex-Parliamentary speech" was not to be discussed in Parliament He went on to discuss it further Lord Salisbury, he said, had declared in effect in Exeter that Ulster contained all the light, all that was progressive, all that was not priest-ridden in Ireland "Yet," Sir Charles added, "Ulster returns "to this House—that which contains all the progress and "enlightenment—a majority of Nationalist members" Members to the left of the Speaker, he said, rejoiced when the Prime Minister did speak in public "Lord Salisbury, with all his great ability and the charm "of his eloquence, is never anything in public if not "contemptuous If he has to deal with a question "affecting India there is a suggestion of the black man, "if with the question of Parish Councils, there is the "suggestion that a circus would be much more on their "lines, if he refers to Irishmen, the 'Hottentot' "comparison rises to his lips On this occasion he has "denounced that division of the Irish people which he "calls the unprogressive and unenlightened one as the "Catholic section" The criticism continued for twenty more minutes and concluded with the words "Mr

"Speaker, the language which Lord Salisbury has "uttered would have been a mistake in any man, a "mistake in any politician, and it is not too strong to say "it is a shame and disgrace in a Prime Minister"

Such was the first speech I heard at Westminster—the speech of a brilliant and ardent Irishman about Ireland, and for the next thirty years, at the close of which, not without many a pang, I said good-bye to the kindness, the generosity, and the good fellowship of the House of Commons, Ireland was never for long absent from the Parliamentary arena Yet at the moment I was disappointed I had been fascinated by Sir Charles Russell on the platform, and especially by one speech of his in Lancashire where, after mentioning many other distinguished Irishmen, he referred to "Sheridan, the purest spirit of them all", and his voice faltered, and tears fell from his eyes It seemed to be a very different Charles Russell who was speaking in the House of Commons, and the interest of the debate seemed to be almost academic When, a few hours later, I was rash enough to express my disappointment to my thoughtful friend he was not in the least surprised "But," he said, "what you young men have to remember is that we "conduct our business with great restraint in this place, "and that it is, after all, the centre of the government "of the Empire"

His words returned to my mind after an interval of years when Tim Healy was telling me of his first visit to the House of Commons He had stood, as I also had stood, on the little step or stool within the lobby from which a mere member of the public is permitted to peep through a glass panel into the House itself As he looked he said to Biggar, who had taken him there, that he supposed the occupants of the two front Benches were the

real rulers of the country "Don't you believe it for a moment!" exclaimed Biggar "Those are just a "group of amiable old gentlemen who denounce each "other in public and dine with each other in private "If you wish to find the real rulers of the country you "must look into *Whitaker's Almanack* and turn up the "various Government Departments" Recollecting that much more than half a century has passed since Biggar made that remark, the contemplative mind may perhaps reflect that the more it changes the more it is the same thing

But it was, as I quickly learned, an uncommon piece of good fortune to be vouchsafed a seat under the Gallery On not a few days in February, 1892, I waited my turn with a crowd of expectant and impatient companions in the outermost lobby Probably Members of the House do from time to time think of the impressions which are conveyed to their waiting constituents and friends The impressive features of Parliament are not always of the kind which the visitor has imagined There may not appear, at first blush, those manifestations of efficiency and energy which the optimist has permitted himself to expect But there is without doubt a certain element of glamour and mystery which may deeply affect the stranger, even against his will Power and authority are perhaps not difficult to recognise when contact is made with them, as it may be made at Westminster Yet almost everything seems to be done that can be done to make the stranger ill at ease After the lonely and chilly entry comes the troublesome delay in the corridor It is as if the spirits that govern the place forbade any hasty or thoughtless approach The visitor is not indeed required to take off his shoes in order to enter the sacred citadel But he is compelled

to sit, and to wait, and to come to terms with his own complete insignificance The persons who pass by may be Ministers of the Crown, or clerks, or office-boys, or Members of Parliament But at any rate they *are* passing by They are not kept waiting like uncomfortable schoolboys outside the headmaster's study Nor does anyone appear so small and insignificant as the visitor feels himself to be

Those moments in the outer lobby seem to pass pleasantly enough if by chance some of the conspicuous personalities of the day choose to display themselves Politicians, there is reason to fear, have many faults But a morbid reluctance to excite public comment—favourable, speculative or derisive—is seldom one of them If a politician is in office he may derive dignity from the mere fact of his responsibility Whether he is in office or not, he probably has a background of high hopes and grievous disappointments, failures and successes, triumphant appearances in ill-ventilated halls and hurried retreats from exasperated opponents—all calculated to interest the romantic elector So almost any Member of the House may appear a mysterious and rather dignified figure as he emerges from the glamorous recesses of the Chamber to hail a waiting constituent As he advances down the passage that well-known smile of his (for have not votes to be attracted ?) gathers force and vigour beneath his impressive brows and finally reaches its climax as he approaches his nervous admirer Does not Francis Bacon say, " There is in human nature " generally more of the fool than of the wise, and there- " fore those faculties by which the foolish part of men's " minds is taken are more potent " ? The visitor waits until his turn and time come, as come they sometimes do Then he is led forward, slightly impressed not by

his importance as a voter or as a final arbiter of policy, by whose leave and licence these representatives are permitted to strut and fret their little hour, and to be "free for one to say" this, that or the other thing, but by his own utter unimportance Nervously he signs his promise to refrain from creating any disturbance in the Gallery—not that up to that moment the notion had ever occurred to him—and at length he is looking down from the Gallery itself

Perhaps he is at once struck by three separate facts —the comparative narrowness and smallness of the Chamber, its undoubted emptiness (unless he is lucky enough to be present on an unusual occasion), and the Sphinx-like impassiveness of the Speaker One member is on his feet and a moment's attention reveals the fact that he is speaking But somehow this great law-making body, this vital unit in the government of the world, seems to the inexperienced onlooker positively to be striving after a pose of easy carelessness The general appearance of members, he may think, is almost forlorn, and that effect is heightened by the presence among them of a small minority of exquisite persons whose silk hats shine like orchids in a field of tares Order papers are strewn in disorder about the floor and the benches, and many members have found a comfortable place for their feet on the backs of the benches in front of them The assembled legislators, so far as they are assembled, appear to be engaged in almost every sedentary occupation except that of listening to the speaker They are talking to each other, or reading, or scrawling pencilled notes, while the sprinkling of great, wise and eminent persons on the front benches, with their legs resting upon the table, seem to exhibit a vignette of the primitive untidiness of a sixth-form study

So there may be at first a sense of disappointment—almost of despair—in the newcomer's mind Are these indolent persons (he is tempted to ask) really the people who tax him, who decide what he may and what he must not do, who determine whether his relations with Foreign Powers are to be friendly or hostile? Over them all, it may seem to him, is a general pose of indifference, as if they were saying, "True, we legislate "for the State which has fashioned the greatest Empire "in the history of the world, but we perform the task "as a matter of course and it is not to be supposed that "we suffer any inconvenience from our responsibility" But disappointment quickly gives way to respect, which is increasingly confirmed How much better—the thought almost immediately occurs—is a House like this than a packed House full of uniformed servitors, obeying the whim of a tyrant Besides, it may be that, after all, members show their good sense in not listening to the particular speaker

The debate seems to go on interminably There is a little laughter, and gusts of murmuring and faint disorder help to pass the time With the ringing of the Division Bell a sudden multitude of new figures appear from unseen and unsuspected quarters They troop to the Left or to the Right and then vanish Three Distinguished Strangers and two Ambassadors stare nonchalantly down into the cockpit The visitor is troubled by a complicated spectacle which he cannot understand An attendant stands by watching him as if he were the only dangerous person in the neighbourhood As the visitor leaves the House and returns to the busy street he is conscious that he is in some strange fashion separated from his rulers He is not indeed led by an autocrat, whose sinister methods he cannot hope

to understand, nor by a tyrant whose lash he must obey But he is separated nevertheless Perhaps it is the welter of traditional practice and procedure, of speakers, lobbies, division bells, chairmen and committees which rather oppresses him and makes even of his Member of Parliament a mystery He is undoubtedly impressed, though not in the way he expected He is puzzled by the ways of Parliament, yet not suspicious of them, but trusting in their efficacy and fairness

The casual apprenticeship of February 1892, was soon over, and before it ended I had received, through the good offices of another kind friend, a little pink card, renewable Session by Session, which admitted me to the debates at any time, in the intervals of more exacting and less exciting pursuits So for nearly ten years I had the astonishing luck to listen to some part at least of almost every debate of real interest, until—after ten years of absence—I was sworn in as a member of the House It did not take long to learn that the House of Commons is essentially a second University, and that it possesses a corporate and individual existence of its own that is even better than the members of whom it consists A distinguished scholar, writing not long ago of the President of his College who had passed away, said that he was fearless and decisive, that he despised cant and humbug of every kind, and that he was generous, open-handed, affectionate The words—all of them—might have been written of the House of Commons

Dr T R Glover, in his highly attractive volume "The Ancient World", observes that "when all is said, "the politicians of any age are rarely remembered ten "years after they die or lose their seats in Parliament

"Only historians, pondering sadly over maps, marvel "at the short outlook and the scanty insight of those "who managed our Colonies before they governed "themselves Ancient politicians were little wiser, "and it is one of the touches of genius in the historian "Thucydides that he ignores their very names, unless "it may be that the murder of one of them shows the "temper of the day So little significant, so little "formative, as a rule, are party leaders" It may be easier to regret than to refute words like these Yet there is satisfaction as well as delight in recalling as an eye-witness (not to mention other names) the chiselled and polished eloquence of Lord Salisbury, the disarming raillery of Balfour, the dialectical mastery of Chamberlain, and the effortless spontaneity of Bonar Law, or—on the other side of the House—the humorous vehemence of Harcourt, the shrewdness and sagacity of Campbell-Bannerman, and the leonine force and fire of Gladstone

XIV

THE MEANING OF DEMOCRACY[1]

A DISTINGUISHED Englishman—the "elect of the nation", as the old phrase was—said not many days ago "to-day democracy is fighting hard for its life, and if you believe, as I do, that with all its faults—which are many—there has not yet been devised a better system of government, let us see what we can make of it"

It is pleasant in a world of inaccuracy, to hear a voice so authoritative, and so much regarded, describing democracy as what it really is,—namely, a system of government To judge from much that is said and written, one might suppose that democracy meant a variety of other things, but certainly not a system of government It is so often used as if it were the name of a fancy religion, or a patent medicine, or (and this is the commonest misuse of all) a particular section of the population The serious aspect of the matter is that the habitual misuse of a word may easily encourage a profound misconception of meaning

Now, what precisely is this system of government which is called democracy? Perhaps the question may scandalise the rather influential class of wiseacres who think that "politics" means "party-politics" Of course politics means nothing of the kind It means

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simply the science and the art of governing, and an inquiry into the nature of democracy is a political, but not a party-political, topic There are, as every schoolboy knows, diverting records of discussions, real and imaginary, in which the topic was well canvassed in ancient Persia, in Greece, and in Syracuse The conclusion was that, while despotism, and aristocracy, and oligarchy are systems of government in which the controlling power rests in the hands of one man, or of a few men, under a democracy, on the other hand, every citizen shares in the responsibility of governing Despotism means the rule of an individual , aristocracy means the rule of a few, selected or supposed to be selected according to birth , oligarchy means the rule of a few, selected according to wealth But democracy is " the fairest name of all ", because the burden of ruling falls upon every citizen of the State, and those who hold offices are accountable for what they do in them The essence of the matter is that there is no exclusion All citizens have their individual share in the authority, and the responsibility, of administration It is not merely that the best guarantee for justice in public dealings is the participation in their own government of the people most likely to suffer from injustice The point is that the full stature of citizenship must be denied to many if the tasks of government are confined to the hands of a few In other words, the true plea for democracy is the plea that connects it with responsibility The Prime Minister, the other day, in the speech already referred to, looked forward to a time when " the whole people realise that some share of the responsibility rests on every one in the country " This doctrine is not new , on the contrary, it is well over two thousand years old It is the doctrine which inspired so many of John Bright's speeches in the middle of last

century Take, for example, this passage from a speech which he delivered in Glasgow in 1858

"The great secret of raising any man is to find out something to increase his self-respect If a man becomes possessed with that feeling—if a man sees any way among his fellow-workmen, and in your numerous societies, benevolent or otherwise, by which he can make himself of use—you will at once see the change in the character of the man, and that what was before either stupid or low in his nature seems to be removed or diminished, and you will find that the man has become wiser, and nobler, and happier"

John Bright was using the illustration for thepur pose of advocating a wider extension of public responsibility Perhaps a certain tone of patronage, and a slight air of condescension, were well enough three-quarters of a century ago To-day they would merely excite a smile Since the Great War it has been understood, as never before in this country, that society consists, not of classes, but of individuals But the foundation of democracy remains unchanged It is the distribution of responsibility throughout the whole of the citizen-body

Now, by a curious and deplorable inversion, many people seek to make democracy mean the exact opposite of what it really is Although the very essence of the system of government which is called democracy is that the whole State shares the duty of governing, these unfortunate persons speak of it as if it meant that the controlling power in the State was vested in one particular section of the community—in other words, in the section which used to be, but is no longer, called "the populace", "the lower orders", or "the labouring classes" Obviously if that were the true view, democracy would be open to the condemnation that it brought about precisely the result which it is its true function to

avoid It would mean, in other words, the government of the whole by a part Yet that kind of misconception runs through a great deal of the criticism to which democracy has been subjected both in ancient and in modern times So, for example, Socrates pictured the captain of a ship in the midst of a mutinous crew

"The sailors are quarrelling with one another about the steering—everyone is of opinion that he has a right to steer, though he has never learned the art of navigation and cannot tell who taught him or when he learned, and will further assert that it cannot be taught, and they are ready to cut in pieces anyone who says the contrary"

Similarly, he is scornful of "individuals who consort with the mob", he suggests that a man who has a mind to establish a State should "go to a democracy as he would to a bazaar where they sell constitutions and pick out the one that suits him", and he believes that under democracy a man need not govern though he has the capacity, nor be governed unless he likes, nor go to war when the rest go to war, nor—unless he is so disposed—be at peace when others are at peace

All this type of criticism, and much modern criticism more crudely expressed, go by the board so soon as the fact is grasped that the keynote of the democratic system of government is to refuse to absolve any individual citizen from his full share of corporate responsibility Sneers at democracy for being lawless, variegated, undisciplined, and ignorant lose their point when once it is realised that the true purpose of this system of government is to unite the best qualities of each in a national fellowship of all, and everywhere to hold aloft the banner of liberty and justice But certain obvious conclusions follow if this view is right Democracy cannot tolerate,

or find room for, an exclusiveness of its own For a long time, to be sure, the citizens who were outside the constitution were doing battle to make their way inside How long and how grim that battle was anyone may usefully remind himself in an hour by reading again (for example) the "Epilogue" to John Richard Green's "Short History of the English People" But, having with difficulty made their way inside, the former outsiders should beware of making, in their turn, a new body of outsiders The artisan and the maid-servant have now a full share of public responsibility But it may be well to remember that responsibility is shared not more by the maid-servant than by the marchioness, not less by the artist than by the artisan "The poor", wrote John Stuart Mill more than two generations ago, "have come out of leading-strings, and cannot any longer be governed or treated like children" No, nor will they employ their ingenuity in weaving leading-strings for others And, where democracy takes the form of representative institutions, common fairness and the desire to arrive at a true conclusion make it imperative that every good citizen should be ready and willing to hear both sides of a question fully argued Democracy means self-government through debate There is no virtue in a man's listening with complacency to opinions with which he cordially agrees Toleration begins only when he listens with patience to opinions from which he profoundly dissents

Another obvious conclusion is that where the system of government is democracy—that is to say, where every citizen has a voice in the control of public affairs—self-government does not mean government of each individual by himself, but government of each individual by all the rest That reflection may well give rise to serious

questions as to the limits within which, and the purpose for which, the will of the community may properly be imposed upon the individual We are told that the State is no longer invoked as a parent, nor as a beneficent master, but as the agent, or rather the servant, of the people's will But, where agents or servants are employed, difficult and important questions may arise as to the scope of the employment or the limits of the authority Is not the true solution of the puzzle perhaps to be found within that expression "national fellowship"? "It means hard work," Mr Baldwin says, "it means living up to ideals" Has the ideal ever been more exactly expressed than in the well-known piece of dialogue in the "Republic"

"That State then is most excellently administered in which the largest proportion of citizens use the word 'mine' and 'not mine' with reference to the same thing in the same way?

"Yes, much the best Or, in other words, that State which comes nearest to the condition of an individual man So, when one of a man's fingers is hurt, the whole association which stretches right along the body to the soul, so as to form one single system under the governing principle, is sensible of the hurt, and all of it at the same time feels a sympathetic pain as a whole with the part that is hurt

"And thus it is that we say, 'the *man* is in pain in his finger' So, too, in respect of any part of his body—we speak in the same way of the *man's* pain if any part is hurt, and of the *man's* pleasure when it eases

"Yes, he said, we do, and to return to your question, there is the closest analogy between such a case and the condition of the most excellently administered State"

Plato's far-reaching idea has had many echoes The modern philosopher prefers to say that no one element

of the social life stands separate from the rest, any more than any one element of the animal body stands separate from the rest But the meaning is the same Moreover, there are more bodies than one No slight test of the fibre of the democratic State is to be found in its behaviour towards other States It is so easy to be ignorant of the relevant facts It is so hard to remember that the ideal of liberty is not merely that men shall be free, but also that they shall be willing and eager for others to be free It is so tempting to forget that in international affairs, as in the affairs of families or of neighbours, respect for the feelings and even the prejudices of others is a condition of having one's own feelings and opinions respected The democratic State begins to claim frank disclosure not only of policies and purposes but also of each successive stage of diplomatic and difficult negotiations It will no doubt realise that more conflicts tend to arise from insult than from injury It will observe restraint and patience in speech and writing about other States Perhaps, indeed, as an eminent American statesman and lawyer has hoped, it may cease to be popular for a man to insult other nations in public just as it has ceased to be popular for a man to insult another man in public Nay, it may be that people will learn, in the words of the same wise man, that " not what a nation does for itself but what a nation does for humanity is its title to honour and glory "—and may even learn that " in God's good world the way to scale the heights of prosperity and happiness is not to pull others down and climb up over them, but to help all up together to united success "

XV

THE MISCHIEF OF BUREAUCRACY[1]

IT may be worth while to consider for a moment the real meaning of what is called "bureaucracy" and the nature and extent of its influence in our midst. Now, the term "bureaucracy", as every student of crossword puzzles is aware, is a mongrel combination of two words, one French and the other Greek, and together they mean government by or from an office, or (in a single expression) "officialism". Transferred from things to persons, the term means Government officials collectively. So, for example, eighty-seven years ago Mill was writing of "the inexpediency of concentrating in a dominant bureaucracy all the power of organised action in the community". Two years later Carlyle had something to say of what he described as "the Continental nuisance called 'Bureaucracy'". And in 1860 Mill expressed the view that "the work of government has been in the hands of governors by profession—which is the essence and meaning of bureaucracy". In like manner a bureaucrat is defined, in any self-respecting dictionary, as an official who endeavours to concentrate administrative power in his bureau. Charles Kingsley, in "Alton Locke", said of a certain person that "he had done dirty work for Dublin Castle bureaucrats". In the same book he spoke of "the tyrants of the earth—the plutocrats and bureaucrats". And—for a final illustra-

[1] December, 1935

tion—over fifty years ago a then powerful monthly publication referred to the "intelligent but stern central bureaucratism of Germany"

It would, of course, be quite unfair to draw the inference that, because an official works in an office, he necessarily endeavours to concentrate administrative power in his office But, while no doubt many officials take the opposite view, it is tolerably obvious that some officials are in fact animated by that kind of zeal and regularly make that kind of attempt These are the gentlemen whose handiwork calls for careful examination Now it appears to be true to say that democracy means a system of government under which every citizen has his share of responsibility The essence—the distinguishing mark—is responsibility Bureaucracy is the opposite Here the essence—the distinguishing mark—is irresponsibility Let us try to see clearly how the system works The Minister, who is the head of a particular department, is a member of the Government, the Government is responsible to Parliament, and Parliament is responsible to the citizen-body But what exactly is the position of the official? There is no need to repeat, what everybody knows, that our Government officials are (if the school inspector will allow it to be said) easily the best in the world If they are the pride of their fellow-countrymen, they are at once the envy and the despair of less fortunate foreigners And the best of them, as everybody is aware, are, as a rule, scholars of high academic attainments, who have greatly distinguished themselves in the examination-room, and, scorning the great handicap-race for sixpenny-pieces, have addicted themselves from an early age to the service of the public But the fact that they are distinguished gives them no title to be arbitrary A little over a generation ago, when everybody was

absorbed in the South African business, some of us were familiar with the saying that a man is not entitled to misgovern a continent merely because he has taken a good degree Brilliant attainments, it may be thought, are sometimes even a little dangerous And perhaps the most perilous of all methods is the method whereby one man has the titular responsibility and another man exercises the real power The Minister is indeed responsible But the expert official, upon whom he relies so much, is naturally and necessarily hidden and anonymous He cannot be cross-examined nor brought to book He cannot even, in most cases, be identified

It is, therefore, of paramount importance to ascertain whether and how far the reservoir of experience and skill to be found in the office is employed to diminish or to get rid of responsibility, and to place the Minister, the head of the office—for whom and in whose name the officials do their work—in a position resembling or approaching the position of a dictator—that is to say, in a self-contained fortress of arbitrary power Now for a long time past, and especially during comparatively recent years, Parliament has concerned itself with so vast a range of topics that the mass of legislation—the annual statutory output—has increased almost beyond belief If a man casts his eye along the bookshelves in a barrister's chambers, he can hardly fail to observe how that the annual statutes, from being a reasonably thin and handy volume, have become a heavy and thick volume For example, the statutes for the year 1912 filled no more than 146 pages But, twenty years later, the statutes for the year 1932 filled no fewer than 1,062 pages Side by side with the statutes themselves, there is published every year another volume, entitled

"Statutory Rules and Orders", and, although this volume tends to be printed on thin and even transparent paper, that device does not get rid of the fact that it sometimes contains thousands of pages According to an ancient poet, "a big book is a big mischief" One wonders what Callimachus would have had to say to-day to the annual volume of statutes, with its companion volume of "Statutory Rules and Orders", especially when it is remembered (1) not indeed that everybody is supposed to know the law, but that ignorance of the law is not an excuse for anybody, and (2) the Rules and Orders commonly contain the details and particulars, and the particular is the thing to be done or the thing that is prohibited

But the mass of legislation is one thing Its mode is another And for some time there has been a prevalent and growing practice whereby the Legislature seeks indeed in the statute to make its general intention clear, but the task of formulating and administering the rules and regulations that are to govern the operation of the "skeleton" statute is delegated to some one or other of the Government departments In other words, the task is assigned to a concealed group of anonymous bureaucrats, with the result that, in the words of Lord Justice Farwell, "the Courts are the only defence of the liberty of the subject against departmental aggression" Or, in the words of that eminent and brilliant judge, the late Lord Sumner (who so nearly became Lord Chancellor), we observe "the flagrant clauses we have had making departments their own Courts, the vast mass of government by regulation on top of legislation by Order in Council, and 'departmental Bills', the object of which is to shepherd us and regiment us more and more" It is worth while for the public to examine some of these

" flagrant clauses ", as Lord Sumner named them, with a little care

This is not a party question, or I should not (at this moment) be writing about it It is a question which deeply concerns the whole citizen-body Let it be granted that the method of what is called " delegated legislation " is sometimes sought to be excused on the ground of congestion of business, or the need for haste But what excuse is there for doing the work behind the back of Parliament, and what conceivable excuse, in the name of common fairness, can there be for the practice of placing departmental orders or decisions beyond the reach of the law ? We sometimes hear pleas advanced for what is called, in Continental jargon, " administrative law " But the thing to which I am now referring would with more accuracy be termed " administrative lawlessness " Take, for example, the painfully familiar provision that the departmental confirmation of a departmental order, or the departmental making of any regulations, " shall be conclusive evidence that the requirements of this Act have been complied with ", or that " the order has been duly made and is within the powers of this Act " If the requirements of the Act have in truth and in fact been complied with, why should final and irremovable protection be afforded to what has been done ? The plain citizen may well ask whether it is not quite idle, and indeed actively misleading, to make careful and detailed savings of people's rights in the course of a statute if, towards the end of it, a provision is slipped in that the making of an order is of itself to be conclusive evidence that everything which the statute requires has been done

Or take again the provision—by no means uncommon —that a departmental order " shall be final and not

subject to appeal to any Court ", or that a departmental decision " shall be final and conclusive ", or that departmental rules, orders and regulations " shall have effect as if enacted in this Act " What is the meaning, and what is the effect, unless it be to oust the jurisdiction of the Courts, or—in plain English—to place what is departmentally done or decided beyond the reach of the law ? The well-known legal remedies of " prohibition ", " certiorari ", and " mandamus " are designed to prevent or correct usurpation of jurisdiction, or to compel a duty which has been omitted to be duly performed What is it—the plain citizen may well ask—that makes it in some quarters appear desirable that jurisdiction may be usurped or duties may be neglected with impunity ?

In like manner there is a simple method of obtaining a decision from the King's Bench by means of a " case stated " on a point of law Why does the " case stated " incur so much departmental dislike ? Is it, or is it not, desired that errors in law should be committed at pleasure and go uncorrected ? An ingenious apologist of the departmental view wrote a little time ago that topics of the kind should be kept out of the Law Courts, on the ground that there is a clear distinction between questions of policy and questions of law But, if he had paused to think, he might have observed that, by its very terms, the excuse which he was offering was destructive of itself It is precisely because a question of policy is generically different from a question of law that legal questions and legal rights ought not to be choked or smothered under the cloak of considerations of policy Nobody supposes or suggests that a case could be stated for a court of law on a question of policy But that fact offers not the smallest reason for making it impossible to state a case on a question of law It is because the question of

law can be disengaged from the question of policy that *considerations of policy should not be allowed to obscure or defeat legal rights*

It is, of course, grotesque to suggest that the ambition of bureaucracy is to save the expense of litigation What the enemies of bureaucratic tyranny desire is not litigation, but rather (as I have said more than once) that litigation should be rendered as a rule unnecessary, not by the giving of impunity to lawlessness, but by the diffused and conscious knowledge that, in case of need, recourse may be had to an impartial public tribunal, governed by law, and itself liable to review The knowledge that the machinery exists, and can be employed, tends to have the effect of rendering its employment unnecessary, save only in the exceptional case So, for example, the function of the British Navy is not conflict. Its function is to make conflict undesirable

The effect of law is to secure the observance of rights The effect of administrative lawlessness is, in security, to ignore them Nor is the matter improved by the consideration that arbitrary powers are not carelessly thrust upon a reluctant officialism On the contrary, they appear in clauses carefully placed in Bills presented to Parliament Who drafts these clauses? And why? And at whose instance?

XVI

THE MIRACLE OF THE NEWSPAPER[1]

"MANY are the things that are marvellous," as Sophocles sang, "and there is nought more marvellous than man" Now, in all the works produced by man, is there anything more marvellous than yesterday's newspaper? Forty-two years ago, at a dinner of public writers, where many compliments had been exchanged between magicians like A B Walkley, Harold Frederic, George Augustus Sala, G R Sims, and Augustine Birrell, some agreeable words were uttered by the veteran chairman as he began to reply to the toast of his health "Gentlemen," said the grave Editor—but why is it necessary to conceal the name of my old friend A E Fletcher?—'Gentlemen, geologists tell us that the world has been in existence for at least four hundred thousand years On such an occasion as this, and especially at this hour of the evening, it may be a sobering and steadying reflection to remember that, if that estimate is correct, the world somehow, for at least three hundred and ninety-nine thousand, nine hundred and fifty years, got on very well without the modern newspaper Press"

Well, it is not convenient to argue with an Editor, even though he be in the Elysian fields Perhaps it is better not to ask whether his geologists were accurate

[1] September, 1935

Another old friend—a man of (more or less) exact science—is confident that, for "thousands" of years, there should be substituted "millions" of years But enough of statistics, as they say in deliberative assemblies Do not such topics belong rather to the publishing department? What is less certain is the theory that for all those years, whatever their number, the absence of an efficient newspaper Press did not really matter Might not a valuable essay be written upon the probable course of events if (for example) in the Homeric age, or in the days of ancient Greece or Rome, or in the "Dark Ages," or in the time of the Stuarts, there had been thoroughly capable daily newspapers? Would not "our own correspondent," aided and abetted by able Editors, leader-writers, and sub-editors, have foreseen and prevented the Trojan war, brought back Helen without bloodshed, and ("as we anticipated in these columns") made the Persian war and the Peloponnesian war impossible? Would Socrates have been condemned, or Cicero murdered? And think of the moral and æsthetic effect of "theatrical notices" of the first nights of Æschylus, Sophocles, and Euripides, Aristophanes, Plautus and Terence! How instructive and indeed diverting (which is far better) it would be to-day to ponder the advertisements of the myriad commodities which attracted the minds and the money of many generations of men and women! It would be worth something—would it not?—to read the best "short leader" on the first cheap edition of the Iliad, or the best contemporary Lincoln Springfield or Charles Hands on the reception accorded to that little speech of Demosthenes "On the Crown" There is no need to multiply instances But it is pretty certain that Mr Pooter would have been prepared to find a few pence in order to read the Spencer

Leigh Hughes of the appropriate epochs on the Athenian Assembly, the Roman circus, or the Star Chamber

Well, to-day the miracle of the newspaper Press is before our eyes It is, of course, a necessity in any country which is governed, or is supposed to be governed, by representative institutions No less is it a necessity to the student of that most fascinating of all movements, the course of events Men speak of the ingratitude of dictators and the ingratitude of democracies Is there nothing to be said of the ingratitude of readers? Do we not tend to take too much for granted, and to think with too little thankfulness—if we think at all—of the skill and judgement, the labour and the pains, the discrimination, the restraint, and the enterprise withal, which with perfect regularity and punctuality, day by day and almost hour by hour, exhibit the glittering panorama of the world before our too careless eyes? The person who girds at the Press is, as everybody knows, the first to ask for the morning paper when he comes down (if he does come down) to breakfast, and afterwards, if he happens to suffer from insomnia in the afternoon, none is more clamant for the paper that bears the pleasant name of evening Let me ask again, at the risk of repetition, whether, as a rule, we think as gratefully or even as fairly as we should of the superlative ability, vigour, care and learning, the wit, the humour, the dexterity, the vivacity, and the versatility, the dutifulness, the courage, the conscientiousness, and the ceaseless hard work which create and re-create a first-class newspaper?

The primary function of a newspaper, one may suppose, is to collect from all quarters, with infinite care and ungrudging expense, the news of the day, and to present it with exemplary art, alertness, and speed, in a clear

and attractive form But that task, exacting as it is, is by no means all How often does the reader think of the recurring miracle of the leading articles—so carefully chosen and to-day so pleasantly named, the rapid harvest of we know not how much brilliancy at school and university, how severe a training in affairs, how high a character, and how cool a brain Or, if one turns to the special articles, of which there may appear to the casual reader to be a natural, prompt, and endless supply, do men pause to think in what circumstances and by whose minds each of those topics is deliberately chosen, and with what fastidious care the work is done ? Or, if the eye turn to the cables, the telegrams, and the reports from all quarters of the world, the pictures, the maps, the caricatures and the photographs, the work of the foreign department, the work of the reviewing staff, the work of all the sports departments, the work of the accomplished reporters, the vital and fundamental work of the assistant editors and the sub-editors, together with an indescribable variety of work besides, is it not obvious that we are too much disposed to think that in some mysterious fashion the newspaper automatically produces itself, and to forget that every successive issue of the journal which means so much to us depends upon the daily initiative, the daily diligence, and the well-considered organisation and correlation of the daily diligence of a great unseen band of highly skilled and conscientious artists ? To conceal the art is itself a work of art But there are, as one may repeat, occasions when a debt that is not always visible, and is never claimed, may at least be cordially acknowledged

They used to be a brilliant group of scholars and gentlemen in the parts about Fleet-street of old—now an illustrious procession of shadows To-day, no doubt, the

brilliant group are more brilliant still The remark applies not only to the birds of passage—though it may be doubted whether men like Bowen and Asquith, Charles Russell, Edward Clarke, and the "master of gibes and flouts and sneers" ever did better work than that which they did in Fleet-street or Shoe-lane on the way to the work of their lives But memory lingers on a dazzling group of regular practitioners It would not perhaps be accurate to say that, forty years ago, two Firsts and a Fellowship were an indispensable preliminary to a high position in "The Press Gang" But on most evenings during the parliamentary session you might have found in the leader-writers' row in the House of Commons many of the best brains that Oxford has known There sat Herbert Paul, formerly head of Eton, Scholar of Corpus, and President of the Union, beginning his scintillating "column and a turn" an inch below the top of his first page, leaving the first sentence to be written last Here was H D Traill—formerly Scholar and Fellow of St John's, and author (for example) of "The New Lucian"—"that demon Traill," as Andrew Lang used to call him Not far from him you saw S H Jeyes, the perfect translator of Juvenal, or Sidney Low, a master of history and law, or (too rarely) E T Cook, head of Winchester, and Scholar of New College, of and to whom John Morley, hearing of his two masterly Firsts, followed by an unsuccessful shot at a Fellowship, remarked, 'Then there is some hope for you after all"

Simple enumeration is unnecessary, and long But did England ever know, in any walk of life, a finer character than Charles Prestwich Scott, another Corpus man, whose newspaper in the North was not only a school of politics and of morals but also a school of

style? One who used to be among his chief lieutenants —a Scholar of Balliol who can look back upon two Firsts, a Craven, the Gaisford Prose, and the Gaisford Verse—is still holding aloft the banner of clear thinking and clear writing, to the joy of mankind and the sorrow of prigs Heaven forbid the suggestion that academic distinction is, or ever was, the only introduction to the fair lady of Fleet-street Her chaste embrace is still open, no doubt, to genius of every kind, including that bewildering type of genius which loves and knows machinery and paper and the crucial and Herculean task of distributing a newspaper in the best way at the right time

But it is amusing (though to my partial and remembering eyes a little disgusting) to find third-rate men in other walks of life using the language of patronage and condescension about the great and lovable profession of journalism Andrew Lang wrote of Thackeray "He had the kindness and helpfulness which I, for one, have never met a journalist who lacked" There are many who vote in that lobby If a man chooses to compare the worst in one calling with the best in another calling, he may indeed point a striking contrast But it is also hopelessly misleading Let it suffice that Lang and George Saintsbury (not to mention others) have pricked that transparent bubble for all time One needs only to ask whether any person outside Bedlam really imagines that it is less interesting to discuss the peace of Europe and the welfare of mankind than to spend one's days in attempting to construe a clause in a policy of marine insurance or to explain to incredulous jurymen that "contributory negligence" has precious little to do with contribution

XVII

THE FASCINATION OF THE PRESS[1]

SAMUEL JOHNSON wrote more than a century and a half ago "Of all public transactions the whole world is now informed by the newspapers" If that remark was true in 1773 how much greater is its force to-day With all his prescience Dr Johnson could not have anticipated the almost miraculous developments of machinery and method in the newspaper's primary task of acquiring and distributing to the whole world information of all public transactions Unless readers of newspapers are the most ungrateful of men they must, one would think, sometimes wonder how the remarkable sheet which they are reading came into existence and came into their hands Two conditions, it is obvious, have to be fulfilled and both speed and accuracy are essential to each of them In the first place, the news has to be gathered and converted into the form of a newspaper In the second place, the newspaper, when it has been printed, has to be promptly and adequately distributed

There are some minds for whom the fascination, the profound fascination, of a modern newspaper office consists chiefly in the printing and the distribution of the paper Those of us who were tolerably well acquainted with the production of a newspaper fifty years ago can only marvel at the transformation which has been

[1] January, 1937

brought about The skilful compositor who used to pick up each bit of type with his fingers, and gradually make a line of type, has given up all that and now plays upon the keys of a linotype machine as if upon the keys of a piano, or of a typewriter, and in the twinkling of an eye has produced from fresh metal, and always with a new face, a complete and perfect line From that moment on the task of making up the columns and making up the page, of producing a great number of stereotyped reproductions of the page in a shape that will fit a roller, of equipping and working a surprising number of vast machines, miracles at once of strength and of sensitiveness where a huge roll of paper at one end is rapidly transformed into a heap of printed and folded newspapers at the other end which pour out like a torrent of snowflakes all duly numbered,—this task to-day is as different from what it was half a century ago as cheese is from chalk There follows the great business of distributing the hundreds of thousands, or the millions, of printed copies of the newspaper according to plan—a business which employs a whole army of workers and every kind of transport, from motor-vans to special trains, that the ingenuity of man has devised

If a man takes up a book on the modern newspaper press he will probably find that it is occupied mainly with the mechanical or business side of the adventure,—the work of printing and of distributing the completed product That, of course, is a mode of activity which involves an array of the most difficult and delicate problems and competing and conflicting interests The intensity of the task has been, no doubt, indefinitely increased by growth of circulation and pressure of competition But there have been great changes also in the mode in which the matter to be contained in the news-

paper is communicated to the office Wireless telegraphy and the development of the telephone, to say nothing of carriage by air, seem at once to have facilitated the process and to have made it more exacting But when the fullest recognition has been paid to machinery and mechanism, the ultimate and decisive labour still remains for the minds and the methods of a number of highly skilled individuals

The reader of a newspaper is perhaps apt to think that somehow or other it creates itself He does not reflect, and perhaps it is well that he does not reflect, that each separate part and each separate paragraph contained in it is the result of conscious and deliberate art in some individual or group of individuals Most readers, it may be assumed, turn first to the sporting news—cricket, football, racing, hunting, fishing, golf, or whatever it may be that interests them most in the field of sport They find the results they are looking for, together with an individual description of the most important events by an experienced and skilful hand Do they pause to consider what a vast and intricate organisation is at work to give them what they are seeking? Or there are those who turn first to the Stock Exchange prices, where they find, in addition to a series of carefully classified tables, a record of all the Stock Exchange transactions of the previous day together with a series of articles upon what are for the moment the most interesting topics in the City And of all public transactions at home and abroad by means of cable and telegraph and otherwise they find an immediate and sufficient account It is almost bewildering to think of the carefully contrived network of manifold organisation which the collection and assortment of this enormous and varied mass of material implies, and the skill and judgement, on the part of a deliberately

selected and co-ordinated staff of individual journalists, which must daily and hourly be brought to bear upon it

It will hardly be denied that the main function of a newspaper is to collect and to exhibit the news of the day There may perhaps still linger some persons who cherish the belief that a newspaper has difficulty in filling its columns They do not realise that from the mass of material which is at hand it would be easy to fill the columns again and again The difficulty is, one would imagine, to decide what is to be left out, and suitably to select, to condense and to determine the amount of space and the prominence of position to be given to what is going in Perhaps it is true to say that in recent years less and less space is given to the direct expression of opinion Leading articles, which are supposed to set forth the considered opinion of the newspaper itself, signed articles, which are more detached, and the apparatus of reviews of books, plays, concerts, exhibitions and the like, seem gradually to have fallen into a subsidiary place although letters to the Editor, where members of the public directly help to make the newspaper for themselves, seem to attract both more attention and more scientific treatment But, after all, the news is the thing Not many years ago an eminent journalist, or perhaps it would be more accurate to say an eminent controller of many journals, said that the real power of the Press was the power of suppression Another said " We decide not only what the public shall think, but also what they shall think about "

There is perhaps more than a grain of truth in statements of this kind The function of an Editor has sometimes been compared to the function of a Judge But there is a deep and far-reaching distinction, not to mention other differences. Whatever else a Judge may

have to do, he has not to decide what shall be the evidence No small part of the responsibility of those who produce newspapers consists—does it not?—in the fact that they have it in their power to decide from time to time what shall be the relevant materials to be placed before the public There is an old saying "Let me write a nation's songs, I care not who makes its laws" A contemporary journalist might perhaps be tempted to say "Let me compose a newspaper's headlines and I care not who writes its leading articles" It might be an interesting though difficult enquiry to ascertain what effect is produced upon the public mind by the selection and the display of news, by contrast with the effect produced by the direct expression of editorial opinion Certainly it is a formidable power to be able to determine, for example, whether a speech shall be reported or not, and, if it is to be reported, whether it shall be reported at length, or at some substantial length, or be buried in a three-line paragraph at the foot of a column in an inside page What exactly, one wonders, is the degree of result produced by the edict of a person who controls a whole series of newspapers and who says, for some reason or other, good, bad or indifferent "The name of this person must never appear in any of my newspapers again" The power of the boycott is no doubt great What makes it less great than it might be is the fact that there are more newspapers than one and more groups of newspapers than one

Two striking changes, at any rate, must be obvious to readers of newspapers whose memories can recall any considerable number of years, namely a marked tendency in the direction of brevity and an almost universal refusal to print long reports of speeches There are no doubt powerful reasons for each of these changes It is

sometimes said that the effect of the Education Acts from 1870 onwards was to bring into existence a wholly new and extremely large class of readers who had learned at school to assimilate nothing longer than a paragraph However that may be, no sensible person deplores the departure of prolixity The days have gone by, perhaps for ever, when a public speaker of Cabinet rank could confidently expect, on the morning after his speech, four and a half solid columns in the first person concluding with the invariable words (of almost sacramental efficacy) "Loud and prolonged cheers during which the Right Honourable gentleman resumed his seat having spoken for an hour and twenty minutes" Yet nobody seems a penny the worse To-day the real matter of a speech, if it contains any, is usually condensed into a remarkably short compass The full report and the first person are reserved for a few individuals, and a very few special occasions One curious exception, however, is tolerably manifest Even the most fastidious newspapers seem to be able somehow to find ample space to report, apparently *verbatim*, the wise remarks of those chairmen of public companies whose discourses commonly begin with the statement that the report and the accounts may presumably be taken as read There is no doubt a good and substantial reason for this preference, into which it might be impious to enquire But, whatever the reason may be, if a man really wishes to be reported to-day at length and in the first person it is idle for him to become a Prime Minister or any other sort of Minister, or to learn to speak with the voice of angels His only chance is to take the chair at a meeting of a public company The criticism that seems to be implied by the contrast between the space which he then enjoys, and the very

few lines which he is otherwise permitted, may indeed be painful, but the fact has to be faced

One of the advantages—or ought one to say, disadvantages?—of controlling a newspaper, as of holding one of two or three particular offices in a Ministry, is that everybody knows, or thinks he knows, exactly how the work ought to be done The number of a newspaper's critics is at least as large as the number of its readers Some years ago the editor of a well-known University magazine in a farewell address to his readers enumerated a series of topics which he and his colleagues had surveyed, and added the remark "All these and other phases of thought and action the 'Magazine' has embraced as occasion offered, has nourished as long as convenience served, and has laid aside as the evanescence of public interest or the rise of new excitement seemed to suggest" There was, of course, a touch of Attic salt in the observation But when all is said and done are not these precisely some of the functions which a newspaper is called upon to fulfil? In a similar vein the distinguished writer added "But of criticism the paths are many—the voice of the 'Magazine' is one, and of all editors alike this much may be said They have never hesitated to stand up for the right when they felt that public opinion was with them, they have always protested against wrong when they saw it to be unpopular, they have stated truth when they have happened to know the facts and have never hesitated to resort to fiction when they have been convinced of its superior validity, they have never employed the lumbering and tedious methods of demonstration when they felt that they could rely on the credulity of their readers, they have never asked for gratitude when they found self-satisfaction the surer road to happiness" To what

extent the implications of these words may be thought to express the truth is a question which every journalist may answer for himself

The leading article alas, though not yet dead, seems plainly to be dying Gone are the days when, at a cost of one penny, the intelligent elector could read, for example, in one newspaper three long leaders by men so different as Sidney Low, S H Jeyes and H D Traill, or in another newspaper three long leaders by Herbert Paul, Andrew Lang and Justin McCarthy, To-day for some reason or other the thing is simply not done, which may be sad for the public or for leader-writers or for both George Saintsbury has made some pleasant remarks on the charm of journalism "I think", he says, "that, as with other loves, her infinite variety while she lasted, and the extreme uncertainty whether she would last or not, constituted at least part of her attraction" He added that in less than twenty years' *liaison* with her he found himself twice on the pavement —planted there incomeless, disestablished, and disendowed He had some pleasant things to say, too, of the agreeable uncertainty as to the topic upon which the leader-writer might be required to write "You may have something to propose, but it is somebody else who disposes, and though you may be, as I believe one person once proudly claimed to be, the third-best authority in England on grey shirtings, it may fall to you to discuss the best way of keeping a hand on the manufacture of cocaine" At one time, it seems, Saintsbury often sat opposite to Andrew Lang at the same table writing leaders, and although neither of them was a slow hand Lang had nearly always finished first by a quarter of an hour And of that versatile and prolific writer and critic Saintsbury records his absolute indifference to conditions

and continuity of writing "Many people can turn out work freely enough if you give them a quiet room, uninterrupted concentration of thought, and the like Most journalists learn to dispense even with the quiet room But all times, places and circumstances were alike to Lang, and he could turn into the pavilion during the interval or uninteresting parts of a cricket match and begin, finish or write some middle part of an article on the corner of a table or the top of a locker quite as comfortably as he would in his own study" For reminiscences like these or Saintsbury's no less happy reminiscences of H D Traill and W E Henley the time seems to have gone by, never likely to return Even forty years ago it used to be said that leading articles did not matter because nobody read them, and that circumstance, it was suggested, was the reason why shorthand reporters were given the front seats in the Parliamentary Gallery in order that they might have an opportunity of being accurate while leader-writers sat contentedly behind, not hearing too much Yet perhaps, if a howling mistake were made in a leading article, it is possible that one or two readers might detect it

The power of the Press is a formidable engine to contemplate The indefinite power of multiplication which printing machinery bestows is an instrument not paralleled elsewhere, and it may be a disturbing thought to reflect that the only qualification which a man needs in order to acquire a printing machine is that he must have the money to pay for it But, after all, the world is unfettered in its judgements, and, as the direct expression of opinion in newspapers becomes less and less important, the legitimate influence of a fair and conscientious presentation of the news, diligently collected and wisely controlled, may continue usefully to grow

XVIII

THE LAW OF DIVORCE[1]

IS it not almost time for something to be done about the law of divorce? The question may be asked by those who, from choice and for the moment, desire to avoid "party questions" Many recommendations have been offered, and some legislative proposals have been made But nothing of importance towards the solution of the problem appears to be accomplished Only two or three days ago the distinguished Bishop of Salisbury, whatever his general opinion about divorce may be, was deploring the "tricks and subterfuges" which are now so often employed The problem—if it is a problem—is, in concise terms, whether and how, in the interests of the body politic, and especially in the interests of patient and long-suffering womankind, the provisions of the existing law should be amended and extended? There is something a little odd, and perhaps grotesque, about the atmosphere of mystery and unreality in which the topic is sometimes sought to be enveloped The late Lord Buckmaster, at any rate, was not at all afraid of it A great man observed once for all the mischief which may arise from not distinguishing things that ought to be distinguished, and confounding things that ought not to be confounded The circumstances which give rise to divorce—in other words, which make divorce appear to be a choice of evils—may, indeed, be

[1] October, 1935

grievous or even tragic But it does not take a Selden to perceive that that fact does not make the law itself tragic A cold in the head may perhaps lead to painful or even fatal consequences But there should be nothing fatal about the choice of a hot-water bottle By all means let the topic of divorce be approached with suitable solemnity—indeed, with portentous solemnity if the temperament of the patient, or the physician, should so require But let it be the right topic, and let not the remedy, or the palliative, be confused with the disease

The King's Bench Judge, who is not born to divorce and has no desire to achieve divorce but has divorce thrust upon him, may with a full sense of responsibility try his 100 or 150 divorce cases in an "off day" on circuit, with a stop-watch near his hand But does he really undergo agony of mind, or feel his hair growing whiter, because he has to face again and again the searching and, indeed, momentous question, "Ought I to believe this chamber-maid?" Or does he find the burden of life almost greater than he can bear because of the doubt, recurring often to his swift thought, "Is this page in the hotel register a forgery, a palimpsest, or the real thing?" It was without doubt a sad exaggeration to say that the average pass-man, if he rose early, had a light breakfast, and brought his mind to bear upon the matter, could between Saturday and Monday get up the whole English law of divorce, including the subtle (but not elusive) distinction between "alimony" and "maintenance", an "intervener" and a "co-respondent" Nevertheless there do seem to be some practitioners in the Divorce Court who, in spite of the anxieties of a troublesome world, remain reasonably cheerful men, and are able to sit up and take a little

nourishment "*Sunt lacrimae rerum*"—also "*crocodilorum*" Things have their tears—and crocodiles have theirs

In Papua and among Roman Catholics marriage is still said to be indissoluble Nobody in England seeks to make divorce compulsory But in a proper case why should it be refused? What, one may ask, is the essential nature of that delicacy and good taste, that instinctive decency, self-respect, and social duty which make it necessary or desirable that an innocent woman—possibly delicate and probably sensitive—should be chained for a life-time to a habitual drunkard (for example) or a "drug-fiend", to a hopeless lunatic or a convicted but reprieved murderer, to a habitual criminal or a monster of cruelty, to a husband who has to all intents and purposes deserted her, or has compelled her to regard him, on strong and sufficient grounds, with an invincible aversion? Unfortunately, the dead hand of obsolete or obsolescent law still holds in a tight grip a few things which are of consequence Perhaps it is not vouchsafed to everybody, whether in Holy Orders or out of them, to appreciate the full sublimity and beauty of the doctrine that if one of two married persons is guilty of misconduct there may properly be divorce, while if both are guilty they must continue to abide in the holy estate of matrimony The conception of the law and practice of divorce as a kind of moral "obstacle race" may be magnificent But it is not peace The Scripture says, "Thou shalt not commit adultery" The law and practice of divorce, as at present settled, seem to pluck the trembling ear of the husband or the wife who is finding life intolerable, and to repeat the Commandment —omitting the word "not"

The problem is, of course, one of no small importance

Yet its dimensions ought not to be exaggerated Extremely few marriages in a thousand, it may be hoped, are irretrievably unhappy Here, as elsewhere, the exception tends to attract more public attention than the rule Yet that circumstance offers not the smallest reason why the exception should be treated unfairly It makes, to be sure, not merely some difference, but all the difference, whether marriage is regarded as a prison from which it is a matter of public duty to make it exceedingly difficult for the prisoner to escape, or as a mode of good life containing unique and infinite possibilities of virtue and happiness which ought not lightly to be denied or destroyed It is so easy for so many persons to pass by troublesome questions, after the manner of the prudent Levite, on the other side Nor does it require any high degree of gallant or cheery Stoicism to put up with the toothache of somebody else "For better, for worse," no doubt But there are limits "*Est modus in rebus, sunt certi denique fines*"

It is sometimes said that the State, as distinguished from the individual, has an interest in the institution of marriage, and must, therefore, especially for the sake of the family and the children, watch with a jealous eye everything that has to do with divorce But what is there that is singular or remarkable about that incident? In like manner the State has an interest in contract, in tort, and in crime What is the true inference from those facts if it be not that the law should, therefore, be in strict accordance with reason, fairness and good sense, and not opposed to them? It may be that professors of philosophy are still concerned, as Aristotle was, with the question whether the State is logically prior to the individual and the family But nobody is likely to challenge the doctrine that, if the State came into

existence in order to make life possible, it continues to exist in order to make life good Will anybody suggest that the individual is utterly, and in all circumstances, to be subordinated to the State and the family? There is authority, and even ecclesiastical authority, for the proposition that the indissolubility of marriage cannot be proved from the New Testament Is there any other quarter from which it can be proved? And, once it is understood that marriage may sometimes be dissolved, is it not a pure question of practical wisdom, in full view of all the relevant circumstances, to determine in the interests of all what the proper and sufficient grounds for divorce ought to be?

To-day the "open sesame", and the only one, is a particular kind of misconduct But the underlying reason for that doctrine appears to be that misconduct of that kind is something which defeats marriage Just as, in commercial law, after the making of a contract there may be "frustration" of the business enterprise or adventure, so, too, in a totally different sphere it is recognised that there may be "frustration" of the contract of marriage And, if "frustration" be the ground of the doctrine and the basis of decision, for what good reason is "frustration" in fact to be ignored in law except in cases where it proceeds from conduct of one particular kind? Is there any transcendental magic in the statutes of 1857, of 1875, of 1925, or of 1925? Slight changes for the better have, indeed, been made Some old law has 'gone where the old moons go" But what sound objection, it may be asked, is there to a fearless survey of the whole area of "frustration", unless, indeed, marriage is to remain, for the unhappy minority, what John Milton called "a familiar and cohabiting mischief, without refuge or redemption"?

Some years ago when, in happier days, the question arose whether the Government should give in the House of Commons what are called "facilities" for the discussion of a Bill concerning divorce which had somehow got past Scylla and Charybdis in another place, Mr Bonar Law, then Leader of the House, permitted himself to make one of his extremely rare cynical remarks He said that he understood that, if people really wanted divorce, they did without it Is that condition of affairs desirable? Is it really in the interests of the family or the State? My discerning (and frequently apostolic) friend, Mr A P Herbert, seems to take the view that divorce by "mutual consent" is not "practical politics" in England Theoretical law it certainly is not But is it not already, after a fashion, "practical politics"—on the terms that one of the parties consents to supply the other with the irreducible minimum of conventional evidence? Yet the good citizen can hardly contemplate with a tranquil mind so grave a mischief

Cogent testimony upon the need of amendment in divorce law was offered not long ago in the address of an experienced president of the Law Society "It is only after an experience of over forty years of the operation of the present law," Sir Reginald Poole said, "that I have come to the conclusion that the right of the Divorce Court to dissolve a marriage should be extended beyond its present limits" It is true that he was not prepared to go all the way with some of those whom he described as "the apostles of reform", but he emphatically supported the proposal (for example) that the existing law should be so amended as to include the power to "relieve a spouse from the burden of life with another at whose hands he or she has suffered 'persistent and aggravated cruelty'" Sir Reginald Poole pointed the contrast

between the legal consequences of "one isolated act of infidelity"—no matter how "utterly repentant" the defaulter—and of prolonged and grievous ill-treatment

"A man may physically beat his wife, may abuse her before his children and the servants, may render her life, to use a familiar phrase, 'hell on earth', and yet she can only obtain a judicial separation from him which does not enable her to remarry, and which only permits of her obtaining during joint lives an unsecured periodical payment of money, so that if her husband dies a week after the decree she and her children may get no financial provision and find themselves penniless"

The position of such a woman is obviously intolerable It easily leads, as Sir Reginald suggested, to a general suspicion that the separation was due to her own fault More than that, when the torture to which a wife is subjected by her husband does not take the form of actual physical violence, she is not able to obtain so much as a judicial separation "unless she can prove by medical testimony that his conduct has injured or tended to injure her health" In fairness, also, it is obvious that the blame is not invariably on the side of the man "There is the case of a drunken woman who neglects her home duties and her children, there is the case of a jealous woman who suspects her husband's every move—in short, there are cases where the blame rests entirely upon the wife, and in which the husband ought to be placed in the position of being able to get the marriage tie dissolved" Sir Reginald Poole added the valuable footnote that he was not drawing on his imagination for stories of married misery "They are", he said, "the subject of frequent and actual personal experience in the course of my practising career"

Changes in the substantive law of divorce appear to be

quite inevitable As for procedure, by way of diminishing difficulties and inequalities, especially as between rich and poor, it is conceivable that nineteen divorce cases out of twenty, with all their puzzles, may perhaps before very long be heard and determined *gratis* by those diligent and accomplished gentlemen, the stipendiary magistrates, the county-court judges, and the chairmen of quarter sessions who happen to be lawyers

XIX

MR A P HERBERT'S BILL[1]

THE Marriage Bill, as it is pleasantly entitled, was read a second time in the House of Commons on November 20th last by a majority of 66 votes (78—12) That important fact marks without doubt a new stage in the long and difficult endeavour to secure some reasonable instalment of reform in the English Law relating to divorce The ultimate fate of the Bill remains indeed, and may for some time remain, in doubt But a vote for the second reading clearly conveys, and is intended to convey, that some legislation upon the general lines contained in the Bill is thought to be desirable How significant is the fact that only a dozen members went into the lobby against the second reading !

To most of the quiet and rational citizens of this country such a sign of progress is no doubt welcome Nobody seeks to make any attack upon marriage The Attorney-General, it may be assumed, expressed the universal opinion when he said that anything which affects the institution of marriage is a matter which must be approached with the greatest sense of responsibility in view of the importance of the issues involved It is not without significance that the Bill is not named a Divorce Reform Bill but a Marriage Bill In other words, its purpose is to improve and therefore to strengthen the

[1] January, 1937

law relating to marriage Nothing indeed could be more unfair than the description commonly and perhaps thoughtlessly given to persons who would like to see the law of divorce revised and amended—the description of them, namely, as persons who wish to make divorce "easier" No question concerning ease or difficulty is even remotely involved The point is, of course, that the grounds for divorce ought not to be restricted within the narrow and unreasonable compass which is stereotyped by the existing law Whether it is easy or not to obtain a divorce as the law stands, is a wholly separate question Some persons apparently find it easy enough, and on more occasions than one, provided that they are prepared to toe a particular line But experience shows that the method, simple as it may be for those who are prepared to employ it, is bad for marriage, bad for morals, bad for law, and bad for the public

What is desired is not greater ease in reaching the solution of a particular difficulty, but a sounder basis of good sense in delimiting the area within which a solution may be sought It is for that reason that it seems a little unfortunate to speak of the "severity" of the existing law It is not against severity but against narrowness, blindness and incompleteness in the law that complaint is directed Nobody who has really thought about the matter desires that, in the particular field with which the law at present deals, it should become broader or more lax The point is that the particular field is altogether too slight, and that the grounds upon which divorce may be sought should be so revised and enlarged as to exhibit some real relation to the facts of life Nor could anything be more mischievous than the suggestion, more often implied than expressed, that a revision and extension of the legal grounds for divorce involve

a change which would be solely or mainly in the interests of men The truth is rather the other way round As matters stand, adultery alone being the "open Sesame," it is not the mere man who, in general, is oppressed by the sense of difficulty No intelligent onlooker fails to perceive that, in general, the man may be prepared to provide, if not the real, at any rate the apparent, evidence of the fact to be proved But the wife, whose scruples tend to be less elastic, may remain indefinitely bound to a monster of cruelty, a deserter, a murderer, or a hopeless lunatic

A stumbling-block in the way of reform has been, not indeed the religious, but the ecclesiastical attitude But in this respect there is now a change for the better It has gradually come to be appreciated that nobody seeks to make divorce compulsory, and, on the other hand, that there is no real virtue in making compulsory the continuance of a union whose purposes have been utterly frustrated Once it is admitted by the stickler for ecclesiastical propriety that the relationship of marriage may on some particular ground be dissolved, it becomes a question for reason and good sense whether that particular ground exhausts the whole foundation of the matter A marriage may be dissolved if, by reason of adultery, the contract is frustrated But is that the only mode of frustration, and, if not, in what respect and why does it stand upon a special and peculiar plane? A little honesty and a little courage make it clear that marriage is not defeated by one cause and one cause alone And if there are other causes of frustration no less potent—cruelty, for example, or desertion, or incurable lunacy—what sound or plausible reason can be found for withholding relief in a proper case?

The Marriage Bill as it now stands will undoubtedly

be the subject of much discussion, and probably of much amendment It contains subsidiary provisions upon which, perhaps, even its chief supporters are prepared for afterthoughts But the essential purpose of the measure, as it has long been the purpose of all who have concerned themselves in the reform of the law of divorce, is to put an end to the doctrine that divorce is not to be had unless and until one of the parties is prepared to commit either adultery or perjury The natural and probable consequence of that doctrine is that too often the wrong people can, and the right people cannot, obtain a divorce A further and unexpected result is that a public confession or profession of adultery is rapidly ceasing to involve any serious stigma "A divorce was wanted," the man in the street tends to say, "and so, of course, the husband did the decent thing" If that state of affairs exists, it cannot be thought to conduce to the interests of morality

By a mere coincidence perhaps another factor helps to produce a like result Not long ago the Legislature, with the best intentions in the world, took steps to prevent the publication of the evidence in cases concerning divorce The intention was, to be sure, wholly admirable But it may be doubted whether the method that was adopted produced quite the result that was desired Perhaps that is not an uncommon feature in well-meant legislation The critics of publicity were deeply concerned lest the minds of readers should be shocked But perhaps they paid too little consideration to the view that the fear of publicity was precisely one of the chief deterrents in the way of those who desired, or feared, divorce

The essential purpose of the Marriage Bill, and of all real reform of divorce law, is to secure a legitimate and

reasonable extension of the grounds upon which a decree of divorce can be sought and obtained Nobody in his senses would seek either to make marriage a temporary alliance or to undermine the foundations of family life The Bill contains, as it stands, a provision that no marriage is to be dissolved within five years from the time when it is contracted To the mere onlooker that seems to be a provision to buy off unreasonable opposition In a proper case it appears a little difficult to understand why any such statute of limitations should universally apply But it is at least as difficult to understand what reasonable opposition there can be to the proposal that desertion should afford good ground for divorce That is already the law in Scotland, in New Zealand, in South Africa, and in Australia, not to mention territories that lie outside the British Dominions In England, at present, one act of adultery suffices But a prolonged period of desertion is irrelevant Is it surprising in such circumstances that there is a good deal of what has been called "arranged adultery", sometimes actual and sometimes mythical? Similar considerations seem to apply to cases of cruelty, habitual drunkenness, and incurable insanity It may be said that the number of such cases is limited So much the better Then the numbers of divorces based upon such grounds will be limited also But how can that reflection be thought to offer any good reason why, where the facts are of a certain kind, the appropriate relief should be denied? And what is to be said of the position of a woman who remains indissolubly married to a man found guilty of murder and serving a sentence of penal servitude for life?

The opponents of reform invariably, or usually, dwell upon the increase in the number of divorces and the

unfortunate fate of the children where divorce has taken place But if the number of divorces has increased, so also has the population, and—what is more—during recent years it has been made possible even for poor persons to obtain divorce Does anybody outside Bedlam desire to go back to the system whereby, in order to obtain divorce, it was necessary for the innocent party to incur the almost intolerable expense of a Parliamentary Bill ? As for the children of divorced parents, their lot is indeed unfortunate But how about the children of parents who vehemently desire divorce and, as the law stands, are unable to obtain it ? A thought might at least be given to the unhappy children of parents who hate each other while they are compelled reluctantly to live together The only relevant considerations, as everybody recognises, are the interests of the State, society, morality, the parties and the children

Some fuss has been made, to be sure, about the position of the clergy But it should suffice for them, as for others, faithfully to observe the law On any other terms the conception of an Established Church becomes difficult It may well be that unity of Church practice in the marriage of divorced persons is desirable Is there any sound reason why it should not be a matter of statutory enactment, which is more to be depended upon than individual preference ? Most people, it may be thought, regard with little favour the remarkable theory that, if one party to a contract of marriage is guilty, the contract may suitably be discharged, while if both parties are guilty the relation of holy matrimony between them must perforce continue

The greater leisure of the House of Lords has before now enabled a measure of reform to be passed through all its stages which nothing has been done to complete

in the House of Commons The reason is simple enough It is because a Bill has no real prospect of making its way through the House of Commons unless the mysterious things which are called "facilities" are vouchsafed to it That is only another way of saying that, if the Government will not allow the necessary time, the Bill is lost On the last occasion one of the main reasons, or excuses, for the refusal of "facilities" was a belief that, if people really desire divorce, they do without it But that is hardly a view which can be expected permanently to excite ecclesiastical approval any more than an increase in the number of persons who have to endure the stigma of illegitimacy

One of the questions which will no doubt receive, as it deserves, careful consideration is the position of the King's Proctor There is evidently no little misunderstanding on this matter It is true that he actually intervenes in a comparatively small number of cases But to dwell exclusively on that fact is to miss the real point of the function which he fulfils The certain and diffused knowledge that the King's Proctor has the power to intervene in a proper case is not the least of the circumstances which, except in a small minority of cases, render his intervention unnecessary If his authority were brought to an end, the enterprise of collusion would no doubt be made much easier and far more common It is said that his activities are sometimes, if not often, set in motion by means of anonymous letters Even if the statement is accurate, what does it matter? The King's Proctor, it may be taken as quite certain, never acts upon anonymous communications, any more than the police in criminal cases, unless and until the enquiries which they have started or suggested appear to have yielded solid and trustworthy material

Nobody who knows anything of the facts can doubt that a considerable number of investigations of real importance, which are now set on foot and pursued, while unsubstantial allegations are sifted and discarded, would be wholly nugatory if the King's Proctor were abolished, and if the decree nisi and the decree absolute were made one and the same

The new stage which the whole of this important topic has now reached may perhaps be marked by the disappearance, or at least the diminution, of some pomposities The policy of "hush, hush" in relation to divorce law has provoked not so much a feeling of respect as the sense of humour The public has been told that the State has an interest in divorce cases So it has And so it has in all cases It is to the interest of the State that all contracts should be performed, that no torts should be committed, and that no crimes should be perpetrated But the suggestion that contracts of marriage, and petitions for divorce, should be surrounded with some special and peculiar atmosphere of sacrosanctity convinces only those who are convinced beforehand Divorce cases, as a general rule, appear to differ from other cases only in the fact that they are comparatively free from difficulty The intellectual strain of determining whether a chamber-maid has identified a photograph, or whether a particular entry is contained in an hotel register, can be borne by a reasonable man a great many times between the sitting of the Court and the mid-day adjournment It is not easy to understand indeed why the bulk of the cases are not simply transferred out of hand to the excellent adjudication of county court judges and stipendiary magistrates There has been more than enough "attitudinising" on this point As for the notion that there somewhere reposes some

esoteric doctrine of "discretion," known only to a kind of Sphinx or contemporary Delphic oracle, it may be convenient to remember some wise words of Samuel Johnson which are of general application "If a man", he said, "pretends to a principle of action of which I can know nothing, nay, not so much as that he has it, but only that he pretends to it, how can I tell what that person may be prompted to do? When a person professes to be governed by a written ascertained law, I can then know where to find him" Humbug has had a long innings, but perhaps the stumps are at length about to be drawn

No sane person supposes that reform of the law and practice of divorce will bring the millennium by return of post It will not establish universal peace It will not cause a permanent improvement in the weather But, within its own modest limits, it may accomplish something at any rate for common fairness and common sense

XX

A VISIT TO SOUTH AFRICA[1]

IF anyone should be puzzled by the important question, How to spend the Long Vacation? he might do worse than consider the claims of South Africa It is, to be sure, a long trek, but not a mile too long There is much to be said for spending about seventy-four days in the adventure—thirty-eight days on the sea, and thirty-six days on land—and hardly an hour needs to be wasted

There are, of course, various ways of seeing something of South Africa, and every one of them is good It is not a bad plan for the idler to sail to Cape Town, and, after a few days in that romantic and beautiful city, to travel by car or rail up to Johannesburg and Pretoria, thence to Bulawayo and Victoria Falls, then back to Johannesburg and the marvels of the Kruger National Park, south to Pietermaritzburg and Durban, back by sea to Cape Town, calling at East London, Port Elizabeth, and Mossel Bay, and so home to England

The voyage itself is a delight Dr Johnson no doubt was of the opinion that no man would be a sailor who had contrivance enough to get himself into a gaol The reason which he offered was, as everybody knows, that being in a ship is being in a gaol with the chance of being drowned But it is fair to remember that his remark was made nearly two hundred years ago If Dr Johnson had had

[1] October, 1936

the agreeable experience of sailing to South Africa in one of the excellent liners of to-day, he might have given a totally different account of the matter He might probably have said that being in a ship is being in an agreeable club, with the sure and certain prospect of being exhilarated and entertained The poet, to serve his private ends, may reflect upon the " unplumbed, salt, estranging sea " But that is hardly the reflection that occurs to your mind as you make your way down the West coast of Africa You may rather think of the sea as an element which does not estrange but actually unites—a colossal highway and means of communication, where the permanent way is gratuitously provided and maintained by Nature herself A moment's consideration shows that the sea does not separate South Africa from Europe On the contrary, it connects each with the other It provides not merely a link but a broad and everlasting road where there is small risk of collision and (with or without a subsidy) no speed-limit And, if one of the effects of the ocean is to break the continuity of the mere land, it may be that for such a being as man in such a world as the present a certain lack of continuity is sometimes tolerable and even desirable

Those who covet speed are welcome to it Happily, the normal trip to Cape Town still takes seventeen days, interrupted only by a brief call at Madeira Early on the first morning you see the sun shining on Ushant Finisterre next morning is a little disappointing—not a conspicuous promontory, but a line of low, undulating hills, with a few scattered houses Between ship and shore pass a string of small cargo boats, steaming northwards By the third noon you have travelled one thousand miles and reached a point in line with Gibraltar There is no sound of guns, however, but only the first

sign of real warmth—a pleasant experience Early on the fourth morning the engines stop in the harbour of Funchal Very beautiful Madeira looks in the sunshine, like some green and auburn jewel, tricked out with points of white, resting on the surface of the sea There is time to breakfast ashore, and as you return to the ship you find at her side forty or fifty boats of men and boys who dive for coins and seek to sell their wares, especially tablecloths, model ships, and strange jewellery The appearance of Madeira from the sea is, you observe, curiously like the hilly shore of an Italian lake

Early next morning you make your way between the Canary Islands, and two days later pass Cape Verde, but too far away to see it Warmth has now become heat, and the porpoise is leaping out of the water By noon on the ninth day half the journey by sea is completed, and you have reached a point in line with Liberia, well south of Freetown Fortunately, a refreshing breeze springs up and prevents the heat which at this stage of the voyage is sometimes inconvenient In the evening of the tenth day you cross the Equator, which none but unusually experienced eyes can discern, and the air is still so cool and invigorating that some of the goddesses on deck may even desiderate the tiny hot sausages which add to the flavour of cocktails The Southern Cross now becomes a familiar sight, the coolness of the weather grows cooler, the captain and the stewards resume cloth jackets, and beef-tea (no longer ice-cream) is served on the sunshine deck On the thirteenth day furs and overcoats have made their appearance, and men begin to compute the hour at which Table Mountain may appear On the sixteenth day you are in the "Cape rollers", a whale is seen to starboard, the albatross and flying fish come to welcome you, and very soon, in perfect sunshine

and a delicious breeze, amid a retinue at length of sea-gulls, you discover at a distance of sixty miles the unique outline of Table Mountain The evening brings the myriad lights of Cape Town and the entrance to the harbour

On the voyage you have made acquaintance with the unbroken solitude of the South Atlantic For nearly a fortnight no land, and hardly another ship, has been visible The marks of South Africa are hospitality, beauty, and sunshine It would be pleasant to linger for many a day in scenes at once so gorgeous and so alluring and among friends so overwhelmingly kind The absence of Herodotus is to be deplored for other reasons and because, if he could revisit Africa to-day, he might tell, in imperishable prose, and in the proper vein of wonder, humour, and urbane scepticism, the marvels that he saw, the marvels that he was not allowed to see, and the marvels that he was told Or if Godley or C E Montague were still among mortal men either of them might reveal how the father of history would have described the mighty and wonderful works, the miracles and the wisdom of the South Africans and their land

It is necessary to tear yourself away from Cape Town, the beauty of its scenery, the splendours of its public buildings and memorials, and the elegance of its private establishments Distances are long in South Africa, but the roads and the railways are excellent The journey to Johannesburg is a day and a half by train over the Hex River Mountains, past Louws River, and through the Karroo, with a slight pause at Beaufort West and another at Kimberley, then across the Vaal River at Fourteen Streams, and through the pastoral districts of Western Transvaal You see the dumps of earth which represent the worked-out claims of alluvial diamond diggings, and

in the afternoon reach Potchefstroom, the oldest town in the Transvaal, and Randfontein, the western extremity of the main reef called Witwatersrand

Architecture is not the strong point of Johannesburg, but its wealth is fabulous, its generosity unbounded, and its industry, which has reached the zenith of technical perfection, quite indomitable You find here ample evidences of that enduring faith to whose members mankind owes, and seems likely always to owe, so much It is not a far cry to Pretoria, in its picturesque setting of hills, where the house of Paul Kruger is kept as it used to be But now you set out for Rhodesia, by way of Mafeking and Ramathlabama, through Pitsani, where Dr Jameson pitched his camp, Lobatsi, Pilane and Mahalapye, where Livingstone and Moffat set up their first mission station, to the neat and handsome city of Bulawayo, and all the mystery and history of the Matoppos

Another day brings you to Victoria Falls, than which South Africa and perhaps the whole world have no more awe-inspiring grandeur to show Small wonder if (as they say) the American visitor, after gazing spell-bound at the Falls, hastened to cable to New York, "Sell Niagara" It is, of course, one of the two most impressive scenes in South Africa, and the other is that unique game reserve called the Kruger National Park

If one week you pass crocodiles in the Zambesi as your motor-launch goes up stream, the next week in the game reserve you see near at hand from your motor-car the lion, the hippopotamus, the giraffe, the zebra, and an uncounted number of other wild animals, all contented and secure In the early morning (breakfast is at half-past five) you can even see a magnificent lion posing majestically a few yards away from you—in fact (as a

learned professor remarked) "doing the Trafalgar Square stunt"

Gentleness, kindness, cheerfulness—these, Robert Louis Stevenson thought, are the cardinal virtues, and these are the virtues of South Africa Not that that land of sunshine has not some minor problems and difficulties But these, as the philosopher says, are matter for a separate treatise

* * * *

The quiet and rational citizens of South Africa are rather amused than annoyed by the mixed assortment of meddlers, mountebanks, and missionaries who, after a brief stay in some particular corner, are able both to formulate and to solve all the problems and difficulties of a vast continent The visitor soon discovers that there are only two classes of persons who really understand South Africa—those who have spent their lives there and those who spend a week-end in Cape Town and then go home to write a book

A prudent course is to follow the example of the gentleman who stood "silent upon a peak in Darien"—for the excellent reason that what he saw took his breath away Or, if something has to be said—if offences must come—it is pleasant to speak of a country where there are no controversies, where party strife is permanently laid to rest, and where personal rivalries and jealousies are entirely unknown, a country so fortunate as to enjoy a Press which has not only a sense of responsibility but also a sense of style, a country whose Government is composed exclusively of the best and ablest citizens, and a country which on all occasions is represented at the wicket by its first eleven, and never by a second or a third eleven

Yet there are some impressions which can be no more resisted than the resemblance between certain parts of South African scenery, in contour and in colour, now to the Canadian Rockies, now to Switzerland, Northern Italy, or North Wales, and now to the Sussex Downs

Perhaps the first impression is that of the essential unity of the South African continent True, the larger cities are obviously different from each other Johannesburg is no more like Cape Town than Durban is like Pretoria or Pietermaritzburg And in every city there is a remarkably efficient Press, concerned indeed with South Africa as a whole but especially and even minutely concerned with some particular part Yet the organic unity, under a strong National Government, is everywhere manifest The white population in town or country, whether it goes back to British or to Dutch origins, lives in perfect amity and good will, while the happy and smiling faces of the natives speak of contentment and security Those who still retain a lively recollection of the events of fifty, forty, and thirty years ago may be astonished at the completeness of a reconciliation which nevertheless they are compelled to observe Two names constantly recur While Campbell-Bannerman is revered for his sagacious venture of principle, it is said that there would have been no South African War at all if Joseph Chamberlain (instead of some others) had been in South Africa during the closing years of last century The union of British and Dutch, which is the foundation of the edifice, rests upon a pleasant dyarchy The controlling power is in the friendly hands of General Hertzog and General Smuts, and the partnership of Dutch and British is worked out with almost literal exactness For example, everything which is official is printed in both languages Outside a

public building stands a sign-post bearing the word "School"—and below it, in letters of the same size, the word "Skool" Or at railway stations you find little drinking-troughs with the word "Dogs" stamped upon them, and, with an equal degree of conspicuousness, the word "Honde" So conscientiously are susceptibilities, both human and canine, regarded

The system evidently works well There is, of course, the familiar problem, where it is plain that a National Government is quite firmly seated in the saddle for a long time to come,—how is a man of ambition to emerge from the crowd? Obviously there are only two clear and simple methods One is to wave the Union Jack with even exceptional vigour The other is vehemently to expound Dutch "Nationalism"—or even some bolder "ism" preceded by the word Dutch But these perorations, being always taken for what they are worth, and no more, merely contribute to the public stock of harmless pleasure The permanent motto of South Africa is "*Ex unitate vires*", which, being interpreted, is "Unity is the source of strength" Even recent events in and about Abyssinia, if they have sometimes compelled a mood of apology, may also have served to illustrate certain perils that may be thought to lurk in Africa in the absence of co-operation with a great Power

Another unavoidable impression is that, for the present at any rate, Africa seems to depend both directly and indirectly on the mining industry It was said of old that that State is best administered in which the greatest number of persons use the word "mine" and "not mine" in the same sense about the same things There is nobody in South Africa who does not appreciate the difference between that which is a mine and that which is

not a mine Speculation turns upon the questions (1) How long will the reef last? and (2) What would happen if gold should somehow become a comparatively unimportant metal? The second question is indefinitely adjourned, while, for the first, even the least sanguine forecast contemplates a date approaching half a century It is, of course, a fact that there is some agriculture in South Africa, and some cultivation of the vine But nobody would suggest that separately or in combination these activities can compete in importance with the mining industry, and, on the other hand, if anything happened to the mining industry, they also might cease to exist

Yet another inevitable impression is that in the apparently inexhaustible reservoir of native labour South Africa has an asset which is second only (if it be second) to the gold mines themselves Here it might be easy to tread upon really delicate ground and to make gratuitous mistakes It appears now to be generally admitted that there is a native question People are no longer content to say, or to act as if they said, "The Kaffir's a Kaffir and there's an end of it" The native question is indeed a rope of many strands The only thing that is quite certain about it is that the South Africans themselves, who are on the spot, and who know exactly where the shoe pinches, will settle it for themselves—without help or hindrance, encouragement or provocation, from any external source whatsoever On what scale is the native to be paid? How best is he to be represented? How exactly is he to be dealt with in courts of law, whether civil or criminal? These and kindred questions have no regard for the repose of the South African citizen It is easy to say, as some do, that slavery was abolished a century too soon for South Africa It is easy to reflect,

as all do, that out of the ten millions who inhabit South Africa only two millions are white—in other words, that the proportion of native to white population is as four to one, while of the two million whites no fewer than sixty per cent are Dutch But preliminary reflections of this kind contain no solution of the problem They merely direct attention to some of its more obvious difficulties That it will test the good sense and good judgement of those who have to resolve it is manifest enough They are not to be hurried, and they are not to be worried But the native question is, in the old phrase, "knocking at the door", and by comparison with it any question about Nationalism and Republicanism seems to invite only the mildest academic interest Meantime, the native is, in great numbers, being educated, and, however deficient he may be thought to be in initiative, he is attaining—as a diligent, attentive, and imitative pupil—a superlatively high degree of technical skill

The dilatory politician's formula, "Wait and see", has a parallel in South Africa It is "Sip coffee and watch" But there is nothing dilatory about the comparatively tiny group of white men who bear, as they have borne, the burden and heat of the day Their achievements are as remarkable as their efficiency is superb Wherever you look—to the Bench and the Bar, the daily Press, the bankers, the merchants, the shippers, or the best brains of the mines—you find a height of attainment which may well fill any Englishman with a sense of personal humility and national pride English schools, English universities, and English Inns of Court provide the vital nucleus They ask nothing of England—only that she should remain a friendly spectator, maintain the King's peace, and send as many more really capable settlers as can be found and spared

And by settlers they mean settlers—not men who come to play a short innings of "tip and run"

General Smuts, who is to South African thought what the gold mines are to South African economics, says somewhere of the Low Veldt that "greater even than its wonderful fauna, its sub-tropical flora, its unrivalled scenery, is the mysterious eerie Spirit which broods over this vast solitude, where no human pressure is felt, where the human element indeed shrinks into utter insignificance, and where a subtle Spirit, much older than the human spirit, grips you and subdues you, and makes you one with itself" It is a thrill which is within three weeks' reach of the Needles

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Lord Melbourne had the agreeable habit, when some public matter of supposed or alleged importance and urgency was mentioned to him, of asking the question "Why can't you let it alone?" The question seems to indicate a frame of mind useful for persons who are mixed up, or who mix themselves up, with public affairs It is the exact opposite of the frame of mind of Mr Jos Sedley, of whom Thackeray says that at a certain period in his life he began to think that he was somehow or other connected with the public welfare Now, that part of the British Dominions which is called South Africa appears to have suffered somewhat from the Jos Sedleys of this best of all possible worlds So many busybodies have concerned themselves from time to time with the future of South Africa, the prosperity of South Africa, the cohesiveness of South Africa, and even the "uplift" (*horrible dictu!*) of South Africa If a visitor to that land of sunshine does not fall too far short of the average standard of intelligence, he soon perceives that

these attentions, however well meant, are not relished by those to whose good they are directed

South Africa, of course, like most other countries, consists not of classes, nor of a class, but simply of individuals Yet it is perhaps convenient and not misleading to use the expression as including the general body of informed and competent opinion in South Africa And the question which South Africa appears to be inclined to ask is "Why can't you let it alone?"

A trip to South Africa is such an altogether pleasant experience that it may easily provoke the language of enthusiasm But it is essential to avoid that error Just as the cultivated and sceptical South African dislikes uninformed censure and exhortation so also he positively winces under words of praise, especially if they seem to contain exaggeration As for humorous exaggeration, he declines to understand it Yet it may without inaccuracy be said that it is quite pleasant to be in South Africa and quite pleasant to travel to South Africa There are other ways, but it may be doubted whether there is a better way of getting seventy or eighty successive days of unbroken sunshine, without one hour of excessive heat Nor would it be easy to decide whether the days spent at sea or the days spent on shore are the more delightful The spirit of competition and the mania for speed are tending to shorten the voyage to the Cape to fourteen days But there is much to be said for the voyage of seventeen days, interrupted only by a few hours in Madeira It is pleasantly longer than the trip to Egypt or to the United States

The size of South Africa is bewildering Maps may easily mislead In the ordinary Atlas a map of England, a map of Canada, and a map of South Africa appear on sheets of the same dimensions and unless attention is

paid in each case to the particular scale the impression which is produced is wholly wrong The visitor to South Africa must be prepared to travel something like thirty thousand miles But there is nothing arduous in the journey The roads and the railroads are excellent Indeed, the South African railways set an example to all who are minded to provide bed or board on the train

Those who travel up from Cape Town to Johannesburg and Pretoria, and then north to Bulawayo and Victoria Falls returning to Pietermaritzburg and Durban and so back to the Cape, enjoy a panorama of scenery of superlative variety, beauty and magnificence, bathed in perpetual sunshine They will be odd people if they are not filled with admiration, as well by the gifts of nature as by the achievements of man One of the most wonderful sights in South Africa is, without doubt, the Kruger National Park Neither the term Park nor the term Game Reserve conveys any adequate idea of that fine tract of beautiful territory, which measures no less than eight thousand square miles—nearly one sixth of the area of England—and is dedicated to the jealous preservation of animals called wild in security and contentment The traveller arrives before nightfall at one of the rest-houses—Pretorius Kop, for example—has his motor car decorated with a notice which, both in English and in Dutch, bids him " keep in your car " and " keep to the road ", and goes calmly to bed in a little round hut separated from the lions outside only by a fence a few feet high The morning begins with a cup of tea and a biscuit at half-past five and then the tour of the Game Reserve starts amid wart-hogs, giraffes, zebras, lions, and countless other disdainful creatures, including the hippopotamus that slowly winks his left eye in the coolness of his ample pool Many stories are told of this

unparalleled scene of adventure Not the least attractive of them relates how a bold man—from the United States, of course—left his car in order to take a better photograph of a full-grown lion Mistaking the camera for a gun, the lion bounded towards him, the terrified photographer hastily ducked, and the lion passed clean over As the man was hurrying back to his car the lion turned and bounded towards him again The man repeated his manœuvre with complete success and got back to his car in safety Curiosity impelled him next morning to go to the same place for another look And the lion was there all right—diligently practising short jumps

Perhaps even more wonderful than the Game Reserve is the unrivalled splendour of Victoria Falls Description is out of the question, and indeed the artist and the camera have given everybody some kind of a picture As superlatives are to be avoided, perhaps something may be achieved by comparison It was a Lancashire man to whom, as he gazed at Niagara, his host from Long Island remarked "Say, boss, you ought to know that no less than five hundred and ninety-three million, eight hundred and seventy-six thousand, five hundred and sixty-four gallons of water pass over those Falls every minute of every hour of every day" The intrepid Lancastrian merely replied "Well, you see, there's nowt to stop it" But it was a citizen of the United States himself who, after an hour's scrutiny of Victoria Falls, observed, and observed sadly "Compared with this, Niagara is just a bit of perspiration"

Vast, magnificent, varied and beautiful, South Africa is a monument of the white man's work And like the virtuous person of old, it thinks itself worthy of great things being worthy Certain consequences inevitably

follow There is not, for example, the smallest probability that South Africa will ever be in danger of carrying co-operation or even obedience to the point of obsequiousness Nor, so far as can be judged, is anything more completely removed from South African intentions than the ceding of any territory, wherever it may be situated, for any reason or to any Power Woe betide those who, without the cordial consent and assent of the inhabitants directly concerned, and of their neighbours, should connive at or coquette with any such enterprise

XXI

IN JOHANNESBURG[1]

MR VICE-CHANCELLOR, my Lords and Gentlemen,—When I received a few days ago your kind and indeed flattering invitation to address this learned Society, it did not seem easy to discover a topic upon which I might be prepared to say and you might perhaps be willing to hear something It was indeed suggested that we might consider together some of the differences and some of the resemblances between Roman, Dutch, and English law But my audacity fails to attain that dizzy height Some years ago, it is true, I did venture to address the Juridical Society in Glasgow upon a comparison of Scottish and English law But at that time I was even younger and bolder than I am to-day, and, besides, I was able to consider my impromptus at leisure in the tranquil and helpful surroundings of my own library Now the wonderful railway-carriage in which the generous hospitality of Mr Pirow and Mr Watermeyer permitted me to travel last week to Victoria Falls contained almost everything that a reasonable or unreasonable man could possibly desire But, by a remarkable oversight, it did not happen to contain a Law Library, where references might be verified and where knowledge might be hastily revived or acquired I shall, therefore, exercise on this occasion the preroga-

[1] Address to the Juridical Society of Johannesburg, 25 August, 1936

tive of mercy You remember the case of the young student who, being invited by the great Cuvier to define a crab, cheerfully answered that the crab was a red fish that walked backwards Whereupon, as you remember, the master was good enough to observe that the definition was quite perfect except for three facts first, that the crab was not a fish, secondly that it was not red, and thirdly that it did not walk backwards That little incident has sometimes served for me as a valuable warning, and accordingly I refrain to-night from words even of good omen upon the immensities and the eternities of Roman, Dutch, and English law

But in the course of the few—the far too few—hours which I have so far had the happiness of spending in this attractive and hospitable City, in the midst of the eminent Judges and Counsel who here adorn the profession of the law, one or two less difficult suggestions have been very kindly offered to me, and some of them, with your permission, I will for a few moments pursue May I first dare to hand on, to those who are or will be interested in the practice of the law, the three most valuable words of professional advice I ever received When I went into Chambers thirty-three years ago I had already for eleven years studied law with some diligence and had cultivated the habit, as opportunity offered, of visiting every kind of Court in London and listening with care to the best advocates and the best Judges But I had never settled a pleading nor written a legal opinion It was my good fortune, through the influence of a powerful friend, to enter the chambers of a brilliant member of the Bar who was also a first-rate scholar In those chambers I remained for twelve months as his pupil and afterwards for four years as his "Devil" On the day after my arrival he handed to me a set of papers endorsed

"Instructions to Counsel to settle Statement of Claim" At the same time that wise and busy practitioner uttered three words, and only three words He said to me "Claw the facts" More than once afterwards he returned to that priceless maxim, and dwelt upon the paramount importance, first and foremost, of "clawing the facts" of a case, of examining them, that is to say, with the utmost care in every aspect and from every angle, of tearing them about and turning them inside out, and so mastering and assimilating every ingredient of substance to be extracted from them How often he used to observe, and with what complete truth, that if the facts of a case are thoroughly well appreciated and digested the law which is applicable to the case tends to become reasonably plain Perhaps you know the story of the experienced man of the world who was planting his only son at an English public school When the time to part company had almost arrived, the prudent father asked the headmaster if he might have two or three minutes alone with his boy The headmaster of course assented, and a little later when he was saying good-bye to the father asked him whether, for his own information and perhaps for the benefit of others, he would very kindly disclose the words of undoubted wisdom with which he had just taken leave of his son "With the greatest pleasure," the father replied "I have been telling him that he has now reached a really critical moment, and that the whole of his career—indeed all his future life—may depend upon his learning, with relentless perseverance, to bowl slowly with his left hand with a slight break from the off" In the same spirit, and for a like reason, and with no less warrant I would venture to say to any young man beginning his career in the law, "Claw the facts"

Well, it is said, perhaps with too little accuracy, that you might care to-night to hear something of the English Court of Criminal Appeal That Court, over which the Chief Justice is by statute required to preside, has now been at work for nearly thirty years It is the successor of the Court for Crown Cases Reserved It consists of all His Majesty's Judges of the King's Bench Division, three of whom as a rule sit to hear applications and appeals Its function is to prevent or to correct any miscarriage of justice in criminal cases But it is only in cases tried upon indictment—a relatively small part, though the most important part, of the total number of criminal cases—that an appeal lies to the Court of Criminal Appeal An appeal is heard either upon a certificate granted by the Judge at the trial, or after an application made to the Court by the convicted person himself And there is in a conspicuous place in the cell of every prisoner a notice explaining his opportunity of appeal and the limits of time within which he must apply His notice of appeal, together with the relevant documents, goes in the first instance to the Registrar of the Court, who is a barrister of standing and experience appointed to his office by the Chief Justice If it appears that there is a point to be argued the case is put into the list of appeals Otherwise the papers are sent on to one of the Judges of the Court, who, if he thinks fit, can grant leave to appeal But, if he refuses leave, the prisoner's opportunities are not yet exhausted He can still apply to the Court for leave to appeal, and, when he takes that course, the papers are read separately by each of three Judges, who afterwards, in open Court, hear the application, and, if they think fit, grant leave to appeal The case then comes on for argument as a final appeal In a proper case legal aid at the public expense—

that is to say, solicitor and counsel, or counsel only—is granted It is to be observed that there is no appeal at the instance of the prosecution Such is the force of the valuable maxim that nobody ought to be put in peril twice in the same matter I have not the precise figures at hand, but I believe it is correct to say that only about five per cent of the persons convicted on indictment give notice of appeal In other words about 95 out of every 100 persons convicted on indictment are content not to appeal In practice, I think, about one appeal in five is ultimately successful—that is to say, in about one per cent of the total number of convictions on indictment the Court thinks it right either to quash the conviction, or to substitute a minor verdict, or to reduce the sentence The usual grounds of appeal are that evidence has been wrongly admitted or excluded, or that the jury has been misdirected, or that the sentence is excessive In the first two classes of cases the test is whether, if the trial had been satisfactorily conducted, the jury must certainly, or would inevitably, have arrived at the same verdict If not, the appeal may be allowed But in a proper case the Court will also hear further evidence This course is taken where there appears to have been a serious error or omission in the Court below But, for reasons which are perfectly clear, it is not taken where there has been only some immaterial mistake that has no effect upon the validity of the verdict It is tolerably obvious that, although a particular witness may have made a slip on some unimportant or superfluous point, there may be an overwhelming mass of evidence which shows that the verdict is manifestly correct To put the matter in another form, the Court does not hear further evidence if it is of such a kind that, even if it were heard and accepted, it could have no

effect upon the verdict found by the jury, and therefore no effect upon the result of the appeal It would clearly not be right for the Court to waste public time, or convey a totally false impression, by tediously correcting a trivial and negligible mistake made in the Court below Now it might appear, if one looked only at the mere figures, that the Court of Criminal Appeal spends a great amount of time and trouble to obtain a comparatively small result But any such conclusion would of course be utterly and dangerously misleading The chief value of the Court of Criminal Appeal is by no means due to the fact that from time to time it quashes a conviction or reduces a sentence—though those results are by no means to be despised No, its chief value is to be found, I think, in the diffused and prevalent knowledge that the Court exists, and to the chastening and directing influence which that knowledge permanently exercises It is to be remembered that a great number of criminal cases in England are not tried before a Judge of the High Court but before minor tribunals of different kinds And if anybody desires to arrive at a just estimate of the work of the Court of Criminal Appeal he should compare and contrast the criminal trial of to-day with the criminal trial of fifty or even forty years ago, of which some of us have a lively recollection Perhaps the moral is that which is drawn by Robert Burns with reference to a topic of more general interest —

> "What's done we partly may compute,
> But know not what's resisted"

Let me pass from that brief survey of a large matter to a matter of a totally different kind which I am told may not be wholly devoid of interest—I mean the unabated pretensions of bureaucratic usurpation There

are those who think, or at any rate say, that criticism of the bad side of bureaucracy is an attack upon the Civil Service It is, of course, nothing of the kind The Civil Service in England is a great organization of undoubtedly able and frequently brilliant men whose work is above reproach as it is also above praise And I have not the smallest doubt that 99 out of a 100 of those excellent civil servants dislike and regret at least as strongly as any onlooker the illegitimate activities of a small but aggressive minority No sane person would dream of attacking the Civil Service Indeed few things are more deplorable than to find an experienced administrative official, who is doing the best kind of work within his own administrative sphere, nevertheless harassed and distracted by a fussy external interference which diverts his attention, wastes his time, and impairs his initiative, and actually in the worst cases seems to be inspired by a purpose no more respectable than a craving for the slippery stuff called party capital Upon that point, at any rate, there is no room for misunderstanding But obviously it does not in the smallest degree follow that departmental officials, or departmental Ministers, should be encouraged or permitted either to usurp the functions of the Legislature or to oust the jurisdiction of the Courts Yet everyone who has eyes to see can perceive the system that is at work Partly under the pretext that Parliament has so little time to spare, and partly under the pretext that there is a public demand for so many varieties of legislation, statutes are enacted in skeleton form which empower some department or other to frame regulations or to make orders Even if it were granted for the sake of the argument, and for the sake of the argument alone, that some such method of legislation has become an odious necessity, that proposition would

not furnish the smallest excuse for framing regulations without effective Parliamentary supervision or for making orders which are intended to ignore judicial authority Yet regulations in bewildering numbers are made in the absence of real Parliamentary control , they are clothed with the force of a statute so as to escape the jurisdiction of the Law Courts , while departmental orders are made as to which it is expressly provided that the mere making of them is to be conclusive evidence that the requirements of the statute have been fulfilled, or, alternatively, that they shall not be adjudicated upon in any Court of law in proceedings of mandamus, certiorari, prohibition, case stated or otherwise It is natural—is it not ?—to ask to what cause this intolerance of criticism is due By whom, and for what reason, is it hoped to usurp power with impunity ? Nobody, of course, desires litigation as an end in itself The chief function of Courts of law is preventive And one objection to regulations and orders which are made with the knowledge that they will not be subject to review is that they may tend to be of a different character from that which they might assume if review were not by anticipation excluded Nothing could be more idle than the suggestion that criticism of this type of administrative lawlessness arises from some sort of judicial " amour propre " The independence and the authority of the Judges are the protection and the defence of the public Judges have not the smallest personal interest in the matter But it becomes increasingly clear that, if the public will not control anonymous and sheltered officialism, then anonymous and sheltered officialism may some day control the public, and that, too, not merely in domestic but conceivably also, it would seem, in international affairs

How far, if at all, those observations, or any of them, may be thought to apply to this vast and highly favoured country, or any part of it, I do not know, nor is it necessary to inquire It would be pleasant to think that they have no sort of application Finally may I add a word, and only a word, upon a wholly separate and unrelated matter—I mean the appeal to the Judicial Committee of the Privy Council In some of the British Dominions, it has sometimes seemed, there has been a slight murmuring on the part of a few individuals against that mode of appeal But a little reflection shows that the murmuring could have arisen only from a complete misunderstanding Does anybody really need to be reminded that that significant and conspicuous symbol of the essential unity of the British Dominions—the right of appeal to the Privy Council—involves not the faintest hint or suggestion of subordination? What it implies is, on the contrary, a fraternal temper of solidarity and co-operation No fallacy could be more complete or more gratuitous than that which assumes or implies that an appeal to the Privy Council is an appeal to England from some other part of the British Commonwealth of Nations As a mere matter of geography, it is true, the Judicial Committee sits in London But that practice, I imagine, depends mainly upon ordinary considerations of simple convenience I know of no insurmountable reason why, if it were thought convenient, the Judicial Committee might not sometimes sit, for example, here in Johannesburg The existence of the Judicial Committee as a final Imperial Court of Appeal in high questions of legal principle means, and ought to mean, that some of the best and most experienced legal minds in the British Empire, no matter from what quarter they may severally come, are ready and willing to be applied to the most

important topics of legal principle which may have given rise to serious controversy in one of the Dominions The learning, the experience, and the wisdom of the whole are brought to bear in the interests of any particular part Perhaps it is not generally known, but it is well that it should be known, that on a recent occasion no fewer than five distinguished Judges from different parts of the British Dominions, contributing their learning to the common stock, were actually sitting in the Court in Downing Street as members of the Judicial Committee of the Privy Council And speaking for myself, as a member of the Privy Council, and a former member of the Cabinet, I can conceive no good reason why a distinguished statesman from the Dominions, if he were willing, should not sit, and even preside, in another famous room in Downing Street It is pleasant, and it may be useful, to remember the inexhaustible metaphor which Plato, in a well known passage, puts into the mouth of Socrates He said, as you recollect from your school-days, that that State is best administered which approaches most nearly to the condition of the human body So, for example, if a man's finger is hurt, the whole association which extends right through the body to the mind feels at once and as a whole a sympathetic pain with the part that is hurt, and therefore you do not say that the man's finger is in pain, but what you say is that the *man* is in pain *in* his finger It is the same case with the good State or the good Empire And, accordingly, if, for example, to invent an impossible hypothesis, some trouble should arise in South Africa, the true view would be not that South Africa was in trouble but that the British Empire was in trouble in South Africa During the past few memorable days I have noticed again and again, on the South African

Railways and elsewhere, a coat of arms inscribed with the motto, "ex unitate vires," which, being interpreted, is "union is the creator of strength"—"union is the source, the origin, the parent of strength" And only a day or two ago, as I looked out towards the unspeakable splendour, the sublime magnificence, and the awe-inspiring beauty of Victoria Falls, I could not help observing that the harmony of colour was not at all disturbed, nor was the grandeur of the scene at all diminished, by the red, white and blue of the Union Jack which fluttered serenely in the breeze—the flag of freedom and of justice "Ex unitate vires"—to be united is to create strength Let it be granted that in the past many mistakes, many wrongs, and some crimes have been committed But the past is gone and cannot be recalled Men of sense and judgement have enough to do with things that are present and things that are to come Perhaps you sometimes think, as I do, of some of the last words of the great statesman who said "In my days that are past there are many things to regret, many things to deplore, and some things to condemn, but after all a man's life should be judged as a whole" The State is like the man Let us work harmoniously together, let us cherish your maxim "ex unitate vires," and let us grapple with the problems of the present and the future, whatever they may prove to be, in a tranquil spirit of confidence and brotherly regard, meeting all our difficulties, in the words of Edmund Burke, "Steadily, vigilantly, severely, courageously"

XXII

THE UNIVERSITY OF MANCHESTER[1]

MR VICE-CHANCELLOR, my Lords, Ladies and Gentlemen,—It seems a pity that the well-ordered serenity of this occasion should be interrupted, even for a few moments, by ill-considered remarks But apparently it is laid down by authority, too high to be challenged, and too stern to be disobeyed, that a part of the programme must be what is called a short address Well, our first thoughts, however recently we may have been admitted within this charmed circle, and even though we have not been admitted at all, must be thoughts of gratitude and reverence to those wise, good and famous men whose example, works and benefactions are honoured and commemorated on Founder's Day You, Mr Vice-Chancellor, have just referred to some of them It is not possible, in adequate terms, to repeat their praises or to discharge our debt But perhaps there are two things which, in all simplicity and modesty, may be said One is that this present, with all its amazing opportunities, is to no small extent the legacy or even the offspring of their past The other is that a later generation can never sufficiently appreciate, must less repay, all it owes to the far-sighted and public-spirited men and women who in circumstances of discouragement,—often great discouragement, including that worst of all discouragements indifference—never failed to hold aloft

[1] Founder's Day, 1922

the ideal,—men and women of vision, imagination and unselfish zeal,

> " Who rowing hard against the stream
> Saw distant gates of Eden gleam
> And did not dream it was a dream "

But indeed in this favoured city, in the midst of this favoured county, there has never been wanting a supply of those who had the grace, wisdom and understanding not merely to form, but also to give signal effect to, a high purpose in education Not in Lancashire, certainly not in Manchester will you find, or could you ever have found, the sort of contempt for education and educated people expressed, as you remember, by Mr Tomlinson, the rich miller, in " Janet's Repentance " when he said that he " could buy up " most of the educated men he knew Here, at any rate, there is no lack of interest in education, no lack of effort, no lack of enthusiasm The difficulty is not so much perhaps to discover these forces as to direct them

Now, although I have just taken or at any rate received a degree, happily without undergoing the ordeal of examination, I am neither so young nor so foolish as to imagine that it is in my power to offer you any information, still less any exhortation, upon that difficult problem Let us rather, for a moment or two, remind each other of some things which are already familiar When I think of education, and of education in relation to Manchester, and the function of a great University in the very heart and centre of industrial and commercial England, my thoughts naturally at once go back to that brilliant and fastidious scholar who forty years ago was High Master of Manchester Grammar School It is indeed unfortunate that the remarks of Sir Samuel Dill upon education, public and private, have

not been collected and published If they were, it is a grotesque under-statement to say that they would be a far more interesting and valuable document than the lost Medea of Ovid or the unfinished Ajax of Augustus Sir Samuel Dill's mind, if I may without presumption say so, was saturated with the belief that the brains of the community are the best and richest asset of the community He was all in favour of developing that asset Again and again he used to deplore two tendencies—typical tendencies—which he observed He found that many of the ablest boys at public elementary schools were discouraged, both by their teachers and by their parents, from competing for scholarships at the Grammar School—by their teachers because they desired to keep those boys in their schools and enjoy the credit of their achievements, dwarfed though they might be, and by their parents because they dreaded the consequences of an education which they did not know and could not understand It is natural to wonder whether those, or any similar, tendencies have still to be resisted Nothing of course is easier than to forget that there is education for life as well as for livelihood Nothing is easier for many men than to suppose that education means the same thing as apprenticeship One of the functions, as it is one of the delights, of a great University is to defeat and destroy heresies like these That is not to say that the convinced and unrepentant advocates of the "grand old fortifying classical curriculum" desire to see the universal and exclusive rule of classical teaching But they do, I think, venture with all suitable diffidence to suggest two things One is that it is a rather serious responsibility to decide too hastily that a boy is not fit to receive classical instruction Why should he not have his chance? After all, there were two and only

two great writers of Roman comedy—Plautus was a stage carpenter, and Terence was a slave The other observation is that, though the actual field of classical instruction must in an imperfect world be limited, there is no reason, or at any rate no good reason, why its methods and its spirit should not liberalize and fertilize every other field of instruction It may not be given to every man to satisfy Macaulay's definition of a scholar, and read Plato with his feet on the fender But, on the other hand, there is no department of learning, at school or in the University, in which a man may not be a scholar The word "talent" and the word "latent" are composed of the same letters—only differently arranged You remember the lines in "A Grammarian's Funeral"

> "Oh! if we draw a circle premature,
> Heedless of far gain,
> Greedy for quick return of profit sure,
> Bad is our bargain
>
> That low man seeks a little thing to do,
> Sees it and does it
> That high man, with a great thing to pursue,
> Dies ere he knows it
>
> That low man goes on adding one to one,
> His hundred's soon hit
> That high man, aiming at a million,
> Misses an unit"

It goes without saying that a great civic University in such a city as this knows no aims and purposes in education except the best and the highest May I add one further remark? The aversion to continuous and protracted effort is naturally so strong in the human mind that the gospel of indolence, or of work at demi-semi pressure, has never lacked, and is never likely to

lack, either teachers or followers Hard work is in many quarters unfashionable, but somehow I do not fancy that it has gone out of fashion here It was said of a certain University, not in this county nor in this country, that the students directed the studies and the faculty directed the sports Nobody has ever said that of the University of Manchester I well remember 35 years ago, in the Free Trade Hall, a sentence uttered by Mr Roby, as he then was,—Mr Roby who so contrived to write a great Latin grammar as not to be unable to manage a business in cotton He spoke of the "incorrigible" industry of the youth of Lancashire Dr Johnson, you remember, said that he had never known a man who studied hard, though he gathered from the results that some men—for example, Bentley—had studied hard Some of us know, or think we know, one or two men in the law who studied hard I remember one, at any rate, whose industry was described as "appalling" Well there are many regrets, but nobody ever regretted appalling or incorrigible industry Hard work for a high purpose does not commend itself to the man of the world, but that is precisely because it is one of the best things that life has to offer Really it is no small part of the business of a civic University to overwhelm and finally to exterminate the man of the world You know that gentleman well enough He has been described in memorable words by a master hand—none other than the distinguished scholar and thinker who has so long held the high office of Chancellor of this University "Who does not know," Lord Morley asks, "who does not know this temper of the man of the world, that worst enemy of the world? His inexhaustible patience of abuses that only torment others, his apologetic word for beliefs that may perhaps not be so precisely true as

one might wish and institutions that are not altogether so useful as some might think possible, his cordiality towards progress and improvement in a general way and his coldness or antipathy to each progressive proposal in particular, his pygmy hope that life will one day become somewhat better, puinly shivering by the side of his gigantic conviction that it might well be infinitely worse"

Mr Vice-Chancellor, it is a great delight, as well as a great honour, to be permitted to be here to-day, and on behalf of all whom you have so kindly invited I thank you

XXIII

" SAPERE AUDE "[1]

MR PRESIDENT, my Lords and Gentlemen,—there is entrusted to me, on this pleasant occasion, the imposing toast of " The School, Past and Present " You probably remember that in the good old days—not to be confounded with the bad new days—the newspapers to which fire was always " the devouring element," and an oyster was always " the succulent bivalve," never omitted to say of the prisoner in the dock that he " appeared to feel his position acutely " How much more severe is my torture at this moment ! Charles Lamb says somewhere that we are never quite at our ease in the presence of a schoolmaster He did not dare to say, though no doubt he knew, how helpless we are in the presence of an editor But if you get the two together, and your topic is the very school which the schoolmaster controls, and the very school which wholly failed to control the editor, you undoubtedly feel inclined to refrain from words even of good omen

Gentlemen, there is, I gather, an agreeable custom at annual meetings of city companies whereby the chairman announces that he supposes the report may be taken as read At a feast like this, is it too much to suppose that eulogies of the school—past, present, and indeed future—may be taken as uttered ? Certainly there is at least one

[1] At the Old Mancunian Dinner, 20 March, 1936

famous College in the University of Oxford where, on festive occasions, by reason of the matter and the manner of the unsolicited testimonials that the dear old College invariably provokes—often in broken accents and sometimes in broken English,—that adored institution has for a long time, by common consent, been usually referred to as the " D O C " The abbreviation seems to introduce a faint note of levity into what might otherwise sink into a Hallelujah chorus of the second class Well, perhaps what is sauce for the dear old college—the D O C —may be sauce for the dear old school—the D O S Here, as elsewhere, the immortal maxim " sapere aude " may be a safe guide We all know that the D O S was and is the best, we all know that humbug about gratitude and affection would be at once idle and belated, and we all know that nothing can ever get rid of the fact that when we were at the D O S we did the things that we ought not to have done and (by way of making all square) left undone the things that we ought to have done And we should no more think of praising the good points of the D O S than we should think of analysing in public the more conspicuous merits of our devoted parents Yet it does not escape us that the short way of saying " Old Mancunian " is " O M ," and that when the controlling minds in this Kingdom set to work to contrive a title of merit which money could never purchase, and custom could never stale, it was precisely those two letters " O M " that they selected Often, when I think of the D O S , there come back to my mind some words which the Master of Balliol, fifty years ago, used with reference to his D O C " There is a great interest," he said, " in belonging to an ancient institution The members of it are bound by a peculiar tie to those who have gone before them , they are in a manner

our spiritual ancestors, if they had not been, neither should we have been, and we are indebted to them for more than we know Without vanity we may regard ourselves as belonging to an historical family which has continued during many ages and which numbers among its sons many distinguished and even illustrious persons"

Gentlemen, an eminent Judge once said that public schools turned out sad dogs and private schools were responsible for poor devils The D O S, with fine impartiality, seems to have combined, in some proportion, the virtues of each The illiterate and the vulgar, whether illiterate or not, labour under the delusion that an ancient grammar school is a school for the indifferent teaching of bad English grammar It is, of course, a school of *literae humaniores*, a school primarily devoted to the Greek and Latin classics, and tracing its origin to the revival of learning That is not to say that other topics are wholly excluded Even fifty years ago the haughty nostrils of the Classical Sixth were sometimes offended by the strange fumes of experimental chemistry But—such was our tolerance—I think that, in relation to the banausic studies (and offences must come), we were prepared to act on the unselfish maxim "live and let die"

To our partial and remembering eyes the D O S will always seem to remain the school of Dill and Broadhurst, of Fausset and Fowler, who preached as they practised the immortal gospel

> "*Vos exemplaria Græca*
> *Nocturna versate manu, versate diurna*"

But the world is wide, human nature is infinitely various, there are more patterns than one, and the man of practical wisdom, though he has preferences, does no,

permit himself exclusions No matter how far from Victoria Station the D O S may have moved, all our wishes for it are the best, and all our hopes are sure I give you the toast of the School coupled with the name of a headmaster and an editor neither of whom is to be surpassed

XXIV

PUBLIC OPINION AND PUBLIC-HOUSES[1]

SIR WILFRID LAWSON, who added to his other qualities a pleasant turn of humour, responded in a little verse to some of his less restrained admirers who demanded from him the wholesale closing of public-houses He said (or sang)

> " There is a little public-house
> Which every one can close ,
> And that's the little public house
> That's just beneath the nose "

It was to a like purpose that the wisdom of the East wrote " If every man would cleanse his own doorstep the city would soon be clean " But that admirable public asset and private virtue, the zeal of the reformer, is somehow always deeply absorbed in the task of reforming somebody else Another voice has anticipated me in saying that hypocrisy is the homage which vice pays to virtue Leaving hypocrisy entirely out of account, one cannot help observing that a large and influential number of people enjoy a sufficiently inflamed sense of duty to enable them to perceive—or think they perceive—with absolute clearness what is the duty of other people

But there are limits to the sphere within which this distinctly unselfish frame of mind can be permitted to translate itself into legislation Now it used to be said

[1] January, 1936

that what is called the "licensing question" was a delicate question, and (as everybody knows) a delicate question is a question that lends itself to indelicate treatment During recent years, however, there appears to have been an interesting change, and indeed it seems possible to assign an approximate date to the change No "party question" is any longer involved in the topic, or these words would not, at this moment, be in course of being written It was at the beginning of the year 1921 that it became generally evident that the Liquor Regulations which the Great War had brought into being, with all their drastic requirements, must shortly be put an end to, unless, indeed, they were continued by Order in Council On the one hand there was a pretty general reluctance to go back to the licensing law of the pre-war period On the other hand there was a marked reluctance to continue indefinitely or unnecessarily the stringent provisions of the Liquor Regulations The problem, therefore, arose Was it possible to adapt to a time of peace the lessons which, under this particular head, had been learned during the period of the war? Old Parliamentary hands were not wanting who forthwith described the problem as insoluble It was accordingly entrusted to the Attorney-General of that day (his identity is quite immaterial) and a Round Table Conference, representative of all sections and all interests, met for a series of amicable discussions in the Attorney-General's room at the House of Commons

It would not be possible to exaggerate the good humour and good sense which, from first to last, marked the deliberations of the Conference Those who conferred were members of the House of Commons holding opinions which, on fundamental points, were almost diametrically opposed Yet they vied with each other

in a public-spirited and protracted endeavour to ascertain the highest common measure of agreement, and to hand on to the future every seed of usefulness that could be gathered from the experience of the past The result was an interesting document, signed by every member of the Conference, which, when it was presented to the controlling minds of the Treasury Bench, was received with incredulity and welcomed as "miraculous" Upon that document a Bill was drafted, and in due course the Bill, with some valuable modifications, blossomed into the Licensing Act, 1921, which was added to the Statute Book on August 7th, 1921, and has, during the past fourteen years, governed no small part of the licensing law of this country

The Bill was, naturally and necessarily, a compromise, which is not always a bad thing Moving the second reading in the House of Commons in July, 1921, the then Attorney-General said that the Bill, whatever its imperfections might be, did represent a sincere and honest effort to express what was ascertained to be the highest common measure of agreement "It may be," he added, "that advanced thinkers like the hon member for South Hackney (i e Mr Horatio Bottomley) will detect a lack of logical symmetry in its clauses, and perhaps a want of idealism in its schedules He may tell us that the Bill is illogical, inconsistent, incoherent, and indefensible"

> Mr Bottomley "You are making my speech!"
>
> The Attorney-General "I make no admission under "any of those heads But I should like to observe that, "in my humble judgment, if and so far as the Bill is "illogical, incoherent, inconsistent, and unsym-"metrical——"
>
> Mr Bottomley "And badly drafted"

The Attorney-General "—or badly drafted, it is "likely, unless all my experience is wrong, to contain "the makings of a good and useful Act of Parliament'

Well that discussion took place more than fourteen years ago, and we have now had more than fourteen years' experience of the working of the Act It may be that the time is approaching when (still in a strictly non-party atmosphere) some alterations of the Act may be worth consideration It seems fair to say that, by way of contrast to earlier legislation, the Act exhibited three main features The first was that it provided an elastic scheme of "permitted hours" The second was that it insisted upon a daily break of at least two hours after 12 noon And the third was that by Section 3 (what was called in the House of Commons the "Theatre Supper Clause") certain kinds of licensed premises were allowed a certain latitude in the supply of liquor for consumption "at a meal"

With regard to the break in the afternoon, it may be doubted whether there is much to be said There appears to be good reason to believe that it is a tolerably sound provision, not merely from the point of view of the small class of persons whom Robert Burns used to call "druthies," but also from the point of view of the health and welfare of the extremely large class of persons who are regularly engaged in carrying on the licensed trade Those who would seek to get rid of the break are probably not a large number The elastic scheme of "permitted hours" stands upon a rather different footing Some of those who have criticised the scheme of the Act have not always done justice to its authors The critics direct attention, with varying degrees of indignation or derision, to the contrast between the closing hour

in one place and the closing hour in another place But they forget that a difference of this kind was one of the matters for which the Statute deliberately provided, for the reason that, as a considerable body of evidence went to show, one and the same closing hour was not always equally suitable in all places In one district, it was said, a tolerably early closing hour was right In another district, it was contended, a somewhat later hour was more convenient The Statute, therefore, quite deliberately put an end to a cast-iron uniformity and allowed, and therefore encouraged, within certain limits, a discretion to the good sense and good judgement of licensing justices, who were deemed to know, or to have the means of ascertaining, the individual requirements of their several areas

Now it is quite obvious that, when once an end is put to uniformity, it must be extremely easy to point a contrast between the closing hour in one area and the closing hour in another area But no doubt the sense of humour is provoked if and when the law is administered in such a way that there is one closing hour on one side and another closing hour on the other side of one and the same street The extent to which results of this kind have in fact been brought about is a matter which lends itself to precise ascertainment, and it may be that under this head the existing provisions of the law will usefully receive further consideration The test will, of course, be the interests of the public What is it that is really desired? What is it that will tend to the general welfare? Is it believed, after the experience of the past fourteen years, by those who are in a position to form an impartial and well-considered judgement, that a return should be made to the method of universal and stereotyped uniformity? Or is amendment desired upon the

lines of a distinction between urban areas and rural areas, or of uniformity within particular areas of named and prescribed situation and dimensions? Whatever be the true solution—whether it be one of these or some other solution—it ought not to pass the wit of man, in a non-controversial atmosphere, to arrive at a result which may bear the brunt of criticism and stand the test of experience The proof of this pudding, at any rate, is (one would think) in the eating

It is when attention is directed to Section 3 of the Act (the "Theatre Supper Clause") that topics of a wider kind arise The discussion of that clause in the House of Commons did not indeed bring to light but strongly accentuated the difference between two antagonistic ways of regarding the public-house In one way the public-house is looked upon as an evil thing which good citizens should strive to make more and more disreputable In the other way the public-house is regarded as a necessary and good thing which good citizens should strive to make more and more useful and respectable Compared with the difficulty of reconciling these two views, it may be thought that squaring the circle is merely child's-play But the tranquillity of a less controversial atmosphere helps people to see things in a truer perspective Sensible persons recognise more and more that, at any rate in the latitude and longitude that England enjoys, it is idle to inveigh against the public-house as such, or against the consumption of alcoholic liquor as such Not everybody indeed might be willing to speak of the "tavern-chair" in the terms in which Samuel Johnson spoke of it But, for such a being as man in such a world as the present, it is seen that no good purpose is served by impossible prohibitions Half a century ago a distinguished head-master in the North of England (he had been Senior

Tutor and Dean of a first-class College in Oxford) used sometimes to speak to his Sixth Form of the mischief which was done by over-statement and misrepresentation in relation to moral issues How dangerous (he would say) it is to try to teach boys that it is wicked for men to smoke or to drink, because when they go home at the end of the term they find their father and the parson and the squire smoking and drinking, of course in proper moderation, and they come to the conclusion that their schoolmaster is just a humbug No , the true lesson for men is that virtue in such matters consists in moderation, and that excess is fit only for an undergraduate, and a " freshman " at that

A certain ineffectiveness in some kinds of teaching seems to be due to a failure to appreciate the true end Rather more than a generation ago Lord Salisbury, then at the height of his power, was invited by certain persons of the highest aims to bring about an immediate and wholesale reduction in the number of licensed premises When he asked what degree of reduction was thought desirable, the answer which was suggested was 40 per cent The result, as he pointed out, would be to leave 60 per cent But he added that there were over seventy bedrooms in his house at Hatfield, and that he could sleep no less soundly in one of them than in all Since that time legislative provision has been made for the extinction, upon fair terms, of what are called " redundant " public-houses But how about those that are not redundant ? Are they to be made as good as possible or as bad as possible ?

It may occur to some minds that there is a certain element of invidiousness, not easily to be avoided, where men who have wine-cellars are legislating for men who have only salt-cellars Not many years ago much was

heard of a scheme which was called "local option" The associations of the word "option" are undoubtedly attractive, and many persons were reconciled to what appeared to be the offer of a choice But a little examination tended to show that what was called "local option" might be more accurately described as "local coercion" —a scheme whereby the votes of a certain number of persons in a given area might make it difficult, if not impossible, for other persons to buy in that area the refreshment which they personally desired to buy So regarded, the scheme appeared to be distinctly less attractive, and men began to reflect that the enforcement of what was regarded in some quarters as a moral practice by means of the vote of the majority—even of an overwhelming majority—savoured of tyranny and seemed to contain the essential evil of religious persecution

To-day less is heard of "local option" and less also of what used to be named the "drink bill" A distinguished teacher, many years ago, provoked by remarks which he thought unwarranted about the "drink bill," published an analysis of what he called the "railway tickets bill," and ironically deplored the fact that, as the railways accounts suggested, so many millions of pounds in a year appeared to be spent in the purchase of mere bits of cardboard which men called railway tickets Of course people do not buy railway tickets for the sake of the bits of cardboard, but because they wish to go somewhere, and great numbers of men buy drink not for the sake of drinking but for all the companionship, intercourse, and rest which, in the circumstances of their lives, are to be found in the public-house Reflections of this kind may not be entirely out of place for those whose minds are attracted to sumptuary and ascetic regulations,

and especially to sumptuary and ascetic regulations for other people Interested as they undoubtedly are in morality, they may think it pertinent to enquire whether the basis of morality is not moral responsibility, moral freedom, and conscientious conviction, and whether, in the interests of temperance, it is not better to resist the temptation to appeal to force instead of to reason—the temptation to substitute the police-constable for right teaching and right example

Much will depend upon the frame of mind in which Section 3 of the Licensing Act, 1921, is considered, if and when the time comes for its further consideration Not much encouragement is offered by the law, as it now stands, to the reformed and improved public-house, nor will men wish to revive the older and more sociable form of public-house if they are deeply convinced that the only right thing to do with a public-house is to suppress it But those who remember that man is a social animal, and that for a large and excellent part of the public the public-house at present seems to offer a convenient place for social intercourse, may be disposed to see what can be accomplished in the way of improvement

XXV

THE HOUSE OF LORDS[1]

PUBLIC forgetfulness is sometimes really remarkable For a good many years now the House of Lords, for some reason or other, seems to have passed entirely out of what is called the public mind "The Lords Spiritual and Temporal," it is true, from time to time make a momentary appearance in the opening words of a new Act of Parliament But for all practical purposes they seem to have passed into some Vale of Oblivion The voice of controversy is hushed The rich vocabulary of unrestrained invective is silenced They are merely forgotten

The fact is the more interesting because, as every reader of the Statutes knows—and ignorance of the law excuses nobody—the House of Lords exhibits daily the spectacle of an advertised but unattempted task More than a quarter of a century has gone by since the Parliament Act of 1911 announced, in its unique preamble, that "it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis" Those words contained the perfectly unequivocal declaration of an existing present intention, formally certified by Act of Parliament The prudent preamble hastened to add the words "but such substitution cannot be immediately brought into operation" The machinery of substitution,

[1] January, 1937

it would appear, was ready and waiting But for the moment, and only for the moment, twenty-six years ago, it could not somehow be set to work Then followed these memorable words

"And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords Be it therefore enacted," etc The meaning expressed by this epoch-making preamble is, one might have thought delightfully free from ambiguity The following seven statements or announcements, all closely linked together, and so constituting the combined basis for that particular enactment, are manifestly enumerated

1 It is intended to make a new Second Chamber
2 That Second Chamber is to be sharply contrasted with the existing House of Lords
3 Before the Second Chamber is "substituted" it must be "constituted"
4 It is to be "constituted" on a popular instead of hereditary basis
5 But, although or because that task cannot be immediately fulfilled, it is expedient without delay to restrict the existing powers of the House of Lords
6 This temporary makeshift, however, is to be followed by a measure to effect the aforesaid substitution
7 That later measure is intended to provide for limiting and defining the powers of the new Second Chamber

Now, all these things were said, and indeed prefaced to a statute, twenty-six years ago One point, indeed, was obviously and perhaps purposely left vague It was not made clear whether the restrictions which the Act was imposing upon the existing powers of the House of Lords were to be continued or varied in the deferred measure that was to limit and define the powers of the new Second Chamber, or whether, on the contrary, the powers of the new Second Chamber were to be treated as an entirely fresh topic when the moment for limitation and definition should, some fine day, arrive Such, however, were the representations of the preamble, and the statute was duly enacted—to some extent, presumably, upon the faith of those representations But where are they now? What has been the sequel? And how many persons in a thousand ever give a thought to the sequel?

Yet the Parliament Act of 1911, which was deliberately represented as a mere instalment or prelude of the complete work of art, undoubtedly contained provisions of much importance The scheme of the Act, as every schoolboy knows, is to point a fundamental contrast between Money Bills and other Bills With regard to Money Bills the Act provides, subject to certain conditions, that they may become law even without the consent of the House of Lords One condition is that a Money Bill must, in the opinion of the Speaker of the House of Commons, "contain only" provisions dealing with subjects like taxation, debt, or loans But the certificate of the Speaker is conclusive for all purposes, and cannot be questioned in any court of law With regard to a Bill which is not a Money Bill, the Act provides that if it is passed by the House of Commons in three successive sessions, whether of the same Parliament

or not, and is in each of those sessions rejected by the House of Lords, it may on its third rejection become law without the consent of the House of Lords Certain conditions are added, one of which is that this provision is not to take effect unless two years have elapsed between the date of the second reading in the first of those three sessions and the date on which the Bill passes the House of Commons in the third of those sessions But it is also provided that a Bill is to be deemed to be rejected by the House of Lords if it is not passed by that House without amendment or with such amendments only as may be agreed to by both Houses

Such, then, is the existing law—clearly labelled as temporary and provisional until the deferred measure brings into being, with suitably limited and defined powers, a new Second Chamber constituted on a popular instead of hereditary basis The Parliament Act, 1911, it may be observed, does not contain any definition of the expression "a popular basis" But sometimes a statute may produce results which its authors do not clearly foresee One wonders, for example, what would happen if, while the law remains in its present form, any attempt were to be made to secure the creation of a considerable number of new peers in order to provide a majority in favour of some particular Bill in the House of Lords Would not the conclusive answer be that that kind of remedy or solution has been wholly superseded and destroyed, and that its place is permanently and in all conceivable cases taken by the enabling provisions of the Parliament Act? It looks very much as if the British public had, for the last time in history, heard of the request for a wholesale creation of peers for the purpose of facilitating legislation

But it would not be true to say that the promise to

constitute and substitute a new Second Chamber has been entirely ignored for the past quarter of a century On the contrary, representations have been made with varying degrees of emphasis to successive Governments by persons who—not always for the same reasons—desire to see the promise fulfilled Moreover, the Coalition Government which was formed eighteen years ago appointed a representative Cabinet Committee to investigate the whole matter The inquiries and deliberations of that Committee extended over a long period It is undoubtedly the fact that the Committee weighed and considered every scheme that had ever been made public for the reform of the House of Lords, and many schemes that had never been made public at all But there was only one fact which emerged with absolute clearness—the fact, namely, that it was quite impossible to arrive at any real agreement

The reason for the deadlock, which has had the effect of paralysing all subsequent effort in the same direction, is not far to seek Persons who tend to favour the House of Commons will not consent to make the House of Lords stronger, and persons who tend to favour the House of Lords will not consent to make it weaker The legislation of 1911 had nothing to say to the internal composition of the House of Lords What it sought to do was to define and to regulate the external relations between the House of Lords and the House of Commons But the subsequent and consequential legislation which was then promised for the substitution of a new Second Chamber was obviously of a far more comprehensive and far-reaching character On the one hand it was to provide a new basis for the Second Chamber—a " popular " instead of hereditary basis—and on the other hand it

was to limit and define the powers of the Second Chamber so constituted and substituted

The conflict, or series of conflicts, which this ambitious programme suggests is tolerably obvious Those who observe, or think that they observe, grave defects in the present composition of the House of Lords naturally incline to the view that the correction and removal of those defects would make the Second Chamber stronger Those who complain that the existing powers of the House of Lords have been unduly curtailed naturally claim that the powers of a new and reformed Second Chamber should be larger There arises, therefore, in some minds the vision of a new and powerful legislative body, unexceptionable in point of composition and equipped with ample authority in relation to the House of Commons But there are other minds that contemplate no such picture They look forward, indeed, to a Second Chamber drastically altered in point of composition But they have no wish to see that Chamber, whatever ingredients of reform it may exhibit, armed with any greater powers than those which belong to the present House of Lords The fundamental question accordingly emerges Is it intended to make the Second Chamber weaker or stronger than the present House of Lords ? And by what means is it hoped to obtain agreement between those who desire comparative strength and those who prefer comparative weakness ?

The dilemma seems, at first blush, at any rate, to be inevitable and fatal Perhaps one of the gravest difficulties is contained or concealed in the expression " popular basis," which appears in the forefront of the Parliament Act What is meant by a basis that is " popular " ? Is an electoral basis intended ? And it is to be observed that the sharpest possible contrast is

pointed between a popular basis and an hereditary basis There is to be, the Parliament Act says, a popular "instead of" hereditary basis Does that statement mean that the hereditary basis is entirely to disappear, and that a popular basis, founded upon election, is to be substituted for it? Or does it mean that a popular basis is to be constructed which will, nevertheless, permit some room for the hereditary element? One inference may perhaps be taken as certain If the new Second Chamber were to be constituted wholly, or mainly, or even to a great extent by election, it might become an extremely formidable competitor of the House of Commons

The authors of the Parliament Act, at any rate, did not contemplate the disappearance of the Second Chamber In the years which have elapsed since 1911 it seems probable that more and more citizens have come to share the view of W E H Lecky, who wrote "Of all the forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic Chamber It is at least as susceptible as an individual despot to the temptations that grow out of the possession of an uncontrolled power, and it is likely to act with much less sense of responsibility and much less deliberation" It was the same prudent pen that declared elsewhere that "the necessity of a second Chamber, to exercise a controlling, modifying, retarding, and steadying influence has acquired almost the position of an axiom"

Well, if that axiom is to be observed, what, if anything, is intended to be done? From time to time Governments have expressed the hope that they might be able to grapple with the problem within the limits of the then present session Yet so far the problem

remains, to all intents and purposes, intact Is it really to be expected that, within any measurable period, a scheme may be contrived, and parliamentary time may be vouchsafed, to solve the large group of puzzles which a serious attempt to reconstitute the Second Chamber must necessarily involve ? Some of the puzzles are easy to anticipate Is it intended, for example, to act upon the view of Benjamin Franklin that there is no more reason in hereditary legislators than there would be in hereditary professors of mathematics ? Or is some hereditary contribution at least to be preserved, and, if so, to what extent and by what method ? Are the hereditary peers to choose some of their number to represent them, and if so how many and for how long ? Are no more hereditary peerages to be created after the passing of the Act ? And if the rest of the Second Chamber is to be constituted by election, who are to be the electors, who are to be eligible, and for what period and when ? Above all, perhaps, what are the powers which the new Second Chamber is to possess, and in what respects superior or inferior to the powers of the existing House of Lords ?

Any Government, it may be thought, might well hesitate to embrace the mass of difficulties of which these are only some of the more obvious examples But what is the alternative ? Is there any really practical alternative to making the best of the law as it stands ? No doubt on the morrow of the passing of the Parliament Act there were many voices which asserted that the influence of the House of Lords was destroyed But that was not by any means the view of the calmer heads Lord Lansdowne, for example, asserted—and the event has abundantly proved—that, notwithstanding the passing of the Act, the House of Lords still retained real and

substantial power Certainly it is a little difficult to envisage an English Parliament settling itself in a time of tranquillity to consider and determine the composition, the rights, and the duties of a Second Chamber It is hardly the English way to tackle fundamental problems of the Constitution in advance Nor is it the English way to chafe overmuch at such a matter as the manifest incompleteness which the preamble to the Parliament Act advertises to every reader The more congenial course is rather—is it not ?—to await the occasion and the necessity—especially where it is at least conceivable that the necessity may never arise

XXVI

MUST A DOCTOR TELL ?[1]

THE question, "Must a doctor tell?" or something like it, is sometimes put in a rather misleading form The question is asked "*Should* a doctor tell?" But that little word "should" —apparently so innocent—contains or conceals considerations of propriety, etiquette, convention, or moral or social duty which for the moment it is not relevant to consider He would be a bold, if not reckless, person who should undertake to say in what circumstances, and subject to what conditions, a doctor *should* tell, where the matter is of such a kind that it is a question for his own discretion whether he ought to tell or not But the important topic is totally different, namely, whether in certain circumstances a doctor *must* tell In other words, the question does not belong to the sphere of discretion It is a question, and an elementary question, of law—ignorance of which cannot afford an excuse to anybody

It is evident that in some quarters no little confusion of thought exists upon this important question, and it is sometimes said, and more often implied, that a medical adviser, by reason of the confidential relationship established between him and his patient, and even between him and persons who are not his patients, may properly refuse in the witness-box to answer relevant questions concerning matters which have come to his knowledge

[1] December, 1935

in virtue of that professional relationship But this view is quite erroneous Such refusal to answer is sometimes spoken of as a " medical privilege," and it is said to rest upon an analogy (which is quite a false analogy) between the position of a medical adviser in relation to his patient and the position of a solicitor in relation to his client It may be well, therefore, to consider for a moment the nature of the privilege which arises in the latter case And it is vital to remember that the privilege here spoken of is not the privilege of the solicitor but the privilege of the client

The position of a solicitor with reference to communications said to be privileged was explained with the greatest clearness in the well-known case, " *Regina v Cox and Railton* " That was an appeal which was heard in 1884 by no fewer than ten judges in the Court for Crown Cases Reserved The case was simple enough The defendants, Cox and Railton, who had been partners in business, were charged with conspiracy with intent to defraud Judgement had gone against them in a civil action, and, when execution was issued against Railton, the sheriff was met by a bill of sale from Railton to Cox The validity of the bill of sale being contested in another action, the partnership deed was produced, and it bore upon it an endorsement purporting to be a memorandum of dissolution of partnership dated six months before the judgement in the first action had been given In order to establish the fraudulent nature of this document, in the trial for conspiracy, the prosecution called a solicitor who (after objection had been taken and overruled) gave evidence that Cox and Railton had called upon him a few days after the adverse judgement, had asked what could be done to prevent their property being seized under an execution, had discussed a bill of sale, and had

been advised that Railton could not give a bill of sale to Cox because of the partnership The partners, having arranged that the partnership should be kept secret, paid the solicitor's fee and left his office The Court for Crown Cases Reserved held that this evidence was rightly admitted There was no suggestion against the good faith of the solicitor The question was whether, if a client applied to a legal adviser for advice intended to facilitate, or to guide the client in, the commission of a crime or fraud, the legal adviser being ignorant of the purposes for which his advice was wanted, the communication between the two was privileged The Court held that no such privilege existed "If it did," said Mr Justice Stephen in delivering the unanimous judgement of the Court, "the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitors to whom the application was made would not be at liberty to give information against his client in order to frustrate his criminal purpose Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved"

Mr Justice Stephen went on to explain the true principle on the basis of a famous decision of Lord Brougham's in the year 1833 Quoting Lord Brougham's words, he stated the rule in the following terms "If, touching matters which come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business—or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know

only through their professional relation to the client—they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness" And Mr Justice Stephen cited with approval Lord Brougham's explanation of the basis or foundation of this rule Its foundation was, he said, "regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings" In other words, as Mr Justice Stephen explained, if the rule relating to privilege is to apply, there must exist between solicitor and client both professional confidence and professional employment But this twofold condition manifestly fails to be fulfilled where the client, in his communications with the solicitor, has a criminal object in view For the criminal object must be either avowed or concealed If it is avowed, the client is not consulting the adviser professionally, because it cannot be a solicitor's business to further a criminal purpose But, if it is concealed, the client is reposing no confidence, and the confidence which is the foundation of the privilege never comes into existence "You cannot," in the words of Lord Hatherley, "make me the confidant of crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part Such a confidence cannot exist"

The rule, therefore, comes to be that a legal adviser is not permitted, either during or after the termination of his employment as a legal adviser, except with his

client's express consent, to disclose any communication, whether spoken or written, made to him as legal adviser by or on behalf of his client, during, in the course, and for the purpose of his employment It matters not whether the client is or is not a party to the action in which the legal adviser is invited to make the disclosure But, on the other hand, no privilege exists with reference to any communication made in furtherance of a criminal purpose, whether the purpose is or is not known to the professional adviser at the time of the communication Nor does any privilege exist with reference to any fact observed by a legal adviser in the course of his employment, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was or was not directed to that fact by or on behalf of his client

But how about communications passing between a third party and a legal adviser? The answer is that they are not protected by privilege unless the third party is acting as agent of the person seeking advice, or the communications are made in contemplation of litigation, or for the purpose of giving advice or obtaining evidence (as, for example, from expert witnesses, who may, of course, be doctors) with reference to litigation

It is well to consider for the present purpose the position of a solicitor in relation to the question of privilege, for the reason that it exhibits the opposite of the position of a doctor The so-called privilege of the solicitor is not the privilege of the solicitor at all It is the privilege of his client, and exists only in a proper and defined case Sometimes, it may well be, it amounts rather to a disadvantage—a handicap—to the solicitor himself And the privilege exists, not in order that the particular client who is for the moment concerned may enjoy at

the time some individual benefit, but in order that the general work of the community as a whole may always be carried on, and the ends of justice may regularly be fulfilled, as they could not be fulfilled unless a relation of inviolable confidence were established between the lay client and his legal adviser The privilege exists with reference to communications that come into being in connection with legal proceedings, present or future, or at least have their origin and essence in the confidential association of legal client and legal adviser More than that, a solicitor has a close and inseparable association with the day-to-day administration of the law Not only is he himself an officer of the Court, but in the exercise of all his rights and duties as a member of the profession of the law, he is amenable to the discipline of his own profession, consisting of officers of the Court, and in the last analysis to the Court itself

The nexus is unbroken, and to found an argument upon a supposed resemblance, or identity, between the relation of doctor and patient on the one hand, and the relation of solicitor and client on the other hand, for the purpose of, or in connection with, legal proceedings, is much as if (to repeat the familiar illustration) one should attempt to add five pounds of butter to five o'clock There is no common and relevant term It is not a question of dignity or precedence It is not a question connected with the value of the absolutely invaluable services which the noble profession of medicine ungrudgingly renders to mankind The difference is not one of degree, but one of subject-matter And, in civil as in criminal cases, the so-called " doctor's privilege "—there is, of course, no solicitor's privilege—has no existence except in disordered though amiable imagination So it is that in a court of law, and in the

other relations of life also, the medical adviser stands upon the same footing with his fellow-citizens

One sometimes sees—and not merely in reports of those devastating plagues which are called "after-dinner speeches"—a suggestion that His Majesty's judges, in the trial of cases, should be helped or hindered by gentlemen called "medical assessors" The suggestion is sometimes, though not often, found in association with names of no little eminence in the sphere of medicine—names to which, as the undergraduate said when he was proposing the health of the tradesmen of Oxford, "we all owe so much" But it is not easy to feel quite sure that one knows what the suggestion involves Is there some recondite yet important branch of law, unknown to lawyers, whether at the Bar or on the Bench, but nevertheless familiar to the members, or some of the members, of the medical profession? Has this department of law been hidden from the babes and sucklings who constitute the profession of law, but revealed somehow to the wise and prudent persons who constitute the profession of medicine? If so, where is it, and what is it? Why should not the mind of the reasonable man be brought to bear upon it, in the light of day? These are conundrums, and one may give them up But of two inferences it would appear—subject to contradiction—that one must be right Either it is contemplated that the medical assessor (when he has been well and truly seated on the Consolidated Fund) should advise the Court on questions of law, or it is contemplated that he should advise on questions of fact But, if law is to be the assessor's arena, the judge ought to know, or ought in the usual way to be informed of, that law And, if fact is to be the assessor's arena, one would like to know what could be more mischievous, more disturb-

ing, or more repugnant to first principles than that an eminent physician or surgeon should influence, or seek to influence, the judgement, or the summing-up, of a judge by means of statements of fact made by him to the judge privately, behind the backs of the parties, and apart from the indispensable safeguards of cross-examination? No if it is desired that the judge should have the help of a medical or surgical expert on questions of fact, or the meaning of terms, the place from which that help should be given is (as now) the witness-box, where statements are made on oath, in open court, in the presence of all parties concerned, and subject to the unfettered analysis of public cross-examination If the question is asked "Should a doctor privately tell the judge something?" the answer undoubtedly is—Certainly not

XXVII

THE USES OF SHORTHAND[1]

IT appears from the carefully prepared programme of this important Congress that there now falls upon me the duty of giving a presidential address, and that that regrettable incident is immediately to be followed by "fraternal speeches by Vice-Presidents and others" The contrast is too conspicuous and too painful to be ignored, although why an unfortunate president is deliberately excluded from the class of the fraternal I do not quite understand Yet I think I do understand—although no doubt it would be more in accordance with precedent to assert that I cannot understand—why the honorific position of president of this Congress has been bestowed upon me It is because I have a twofold qualification In the first place, I have never known even a single shorthand sign, and in the second place I have often wished that I could write shorthand The art, if only I had had the necessary time and skill to acquire it, might have saved me a good deal of trouble and at the same time might have provided an additional weapon for purposes of attack or of defence As it is, I combine the impartiality which arises from complete ignorance with all the enthusiasm of an envious admirer.

Shorthand writing, you may be disposed to agree, is not a luxury, nor merely a pastime It seems rather to

[1] Presidential Address, International Shorthand Congress, July, 1937

be a necessity It is a necessity which arises from the fact that men talk faster than they can write Talking is an easier thing altogether than writing It is often, as all members of Parliament are aware, within the capacity of a very foolish person to talk fluently, but he seldom writes with ease, and certainly no fool ever wrote good shorthand You may perhaps think that it might have been convenient if the facts had been the other way about If men could have written faster than they could talk some kinds of transaction might perhaps have been easier But, on the other hand, the store of records might have been rather enlarged than enriched If men could have written down words of wisdom more rapidly than they were spoken it may be that some invaluable sayings which are lost would now be known and treasured But it seems almost certain that the world's store of rubbish would have been indefinitely increased There are those who wish that in past times shorthand had been more widely known But it seemed otherwise to the controlling deities To-day, at any rate, shorthand has become, or is believed to have become, a necessity, and shorthand writers are indispensable servants of the public—without prejudice to the view that mankind might be far happier if the whole mischief of public speaking could be abolished

If the average man's memory were less fallible there would be less need for shorthand You have heard of infant prodigies who, having read Deuteronomy three or four times over, have accomplished the dismal feat of repeating the book accurately from memory But that kind of accomplishment is happily rare In the case of most people a speech enters by one ear and passes out, with agility and without obstruction, through the other ear, leaving behind at most only a vague sense of the

gist of what has been said From such imperfections as slowness in writing and fallible memories (if indeed they are really imperfections) there arises the necessity of shorthand-writing, whether in order to communicate, or in order to record, or in order to convict Statesmanship and philosophy, it is now thought, are of little avail without reporters The great speeches of the ancient orators, abounding in so much trouble and difficulty for schoolboys, would have been lost if they had not somehow been reported Perhaps the statement is also true of the utterances of philosophers and teachers These men spoke at least as many wise words as they wrote and, as memory is a fallible recorder, a large part of their wisdom which has been rescued might have been lost if there had been nobody to take a note Boswell of course was the reporter *par excellence* But about most great men there seem to have hovered groups of scribes who have saved some jewels for mankind

In relation to many kinds of discourse it is no doubt sufficient to know the general sense of what was said, the gist of the spoken word But the remark is by no means universally true In the Law Courts, for example, it is often insufficient to recall the gist of a witness's evidence and it may be necessary to have a precise and complete record of it Hence it is that the presence of a shorthand writer in Court does more than merely expedite the hearing It is in fact quite indispensable for efficient and satisfactory litigation in cases of certain kinds There comes a moment in every trial, as every schoolboy knows, when the issue has to be decided, and at that point it may be necessary for the decision, whether by judge or by jury, that certain evidence should be accessible in full Only in that way, on some occasions, is it possible to have brought to mind the different points

which have been raised in the course of the hearing and are material to a proper decision More than that, it is really intolerable that public time should be wasted, and the attention of the judge distracted, by the practice of taking a judicial note in long-hand It may be hoped and believed that in a little time that mischief, at any rate, will have been brought to an end, and it is only shorthand that can accomplish that result

Nor in the political field is it sufficient to have a report merely of the gist of an important speech A fastidious and critical electorate may desire on occasion to examine the exact words that are used by a public speaker The conscientious voter may require more than a synopsis or a summary The course of recent history might conceivably have been altered if shorthand-writers had not been able to report the speeches of political personages as and when they were delivered The eloquence or the argument of a speaker at a public meeting, no matter how great his skill and no matter how attentive his audience, may have and commonly does have only a fleeting and transitory effect upon those who hear him But if and when, by means of newspaper reports, the public is enabled, if it chooses, to read those speeches at leisure, and to sift, and analyse, and criticise the points, why then the effect of what was said may be just and accurate

It may be objected that the problem could be solved by requiring a speaker, on occasions when it is well to have a record of what is said, to speak at dictation speed so that his words may be taken down in long-hand But in truth that is no solution at all The speaker must in fairness be allowed to deliver, and in practice will deliver, his sentences at natural speed If a witness is required to speak very slowly he may become so confused and the

train of his thought may be so inconveniently checked that he will be entirely prevented from doing justice to himself He may forget points which he desired to make, and which he would have made, if he had been allowed to give his evidence in his own way What is true of a witness is no less true of Counsel The effect of a speech or an argument in Court might be destroyed if the advocate were compelled to speak at a pace at which his words could be taken down in long-hand And it goes without saying that the effect of cross-examination might be wholly lost if questions had to be put at an unnaturally slow pace, and the dishonest witness were given too much time for the contrivance of falsehood The parry and thrust of cross-examination must be allowed to go on at natural speed

It seems true to say that the effect of a speech at a public meeting would be ruined if it had to be delivered at dictation-speed The artistic effect of modulation of the voice, the emphasising of certain points by the use of a deliberate and slow tone, and the treatment of others at a different pace or with slighter accent, are all necessary to a speech which is to be fit to deliver or tolerable to hear Perorations, for example, which call upon a prosperous and contented audience to emulate the feats of their forefathers, or which suggest an analogy between the rising of the sun and the inauguration of the orator's policy, might become even more grotesque than usual if they had to be spoken at dictation-speed

And so it looks as if shorthand were really necessary Talking with ease, writing but slowly, remembering with difficulty, requiring a record of words that must yet be uttered at natural speed—by reason of circumstances of that kind, with what exasperating problems the human race is beset ! So there comes to the rescue the shorthand

writer, on his errand of mercy, and before his pencil, his pad, and all his mysteries the obstacles fade away

Shorthand, as might be expected, has a long and curious history There is some ground for thinking that both the Greeks and the Egyptians elaborated systems of stenography, as distinguished from mere abbreviation The way in which the utterances of Greek thinkers and orators have been preserved is thought to indicate that at least capable note-takers were at work with tablets, parchment and papyrus Use was apparently made of stenographic characters and shorthand signs by the Romans as early as the third century before Christ They are associated with the name of Quintus Ennius, the first inventor of a system of shorthand whose name and history are known to us It is believed that the speeches of Cicero and Cato on the conspiracy of Catiline were reported in shorthand The notes are said to have been made upon the waxen surface of tablets by means of a hard-pointed pencil, or stylus, of ivory or metal To write with speed, where such materials had to be used, must have been a difficult task, and an accurate record of the speeches was made possible only by the fact that, as in the Parliamentary Gallery or at a large public meeting to-day, a considerable *corps* of note-takers worked in collaboration By a pre-arranged division of labour each note-taker took down separate sentences of the speeches, so that when the tablets were collected a complete record of the whole speech could be produced Even so the work must have needed a quick hand and a retentive memory But it must not be forgotten that one of the most engaging qualities of some ancient masterpieces of oratory is the fact that they were never delivered It is known that Cicero's secretary, Tiro, invented a system of shorthand signs When the art of

shorthand writing was revived in England in the sixteenth century, use was made of those Tironian signs, as they were called Cæsar and Augustus themselves are said to have practised and even mastered the art of shorthand writing

Shorthand and the Bishops survived the downfall of the Roman Empire The founders of the Medieval system and the Fathers of the Church made no little use of shorthand writing, and the recorded sayings of many of the early Western Christians have been handed on by means of that art St Augustine is said to have employed no fewer than ten stenographers, competing in point of method and luxury with a Press Association team During the Middle Ages the science and art of shorthand writing were almost lost, but with the Revival of Learning they were recovered and the note-takers practised their hand in time to record the declamations of Savonarola About the year 1588, one Timothy Bright, pleasantly named, revived the art of shorthand in England, making distinct use of the Tironian characters familiar to Cicero Another date in the modern history of shorthand was 1602, when John Willis published his "Art of Stenographie," which took notice of the phonetic method in shorthand writing Since that time there has been a fine variety of shorthand systems, and, if a person should enumerate them all, the hand of the most dexterous stenographer would tire The variety persists to this day Certainly until recently there was a speaker in Hyde Park who, with the help of a blackboard, and an elaborate mechanism to indicate the speed of his work, was to be found every other day expounding his own particular method and its advantages over other and more generally known systems He was treated, it is to be feared, rather as a figure of

fun But such is the common fate of pioneers The alphabetic system was improved upon by Thomas Shelton at the beginning of the seventeenth century and it was his method that was employed by Samuel Pepys in his Diary Since those days shorthand has played an increasing part in the private and public lives of great numbers of people The first permanent appointment of an Official Shorthand Writer in any Court is believed to have been made in 1748, when Thomas Gurney received that appointment at the Old Bailey Certain trials had indeed been reported long before by shorthand writers,—as for example, the trial of Lilburne in 1649, where the report was reprinted from the reporter's transcript One may compare the speech delivered by Charles I on the occasion of the impeachment of the Five Members Another Gurney received the first recorded official appointment of shorthand writer to a legislative body when William Brosie Gurney became Official Shorthand Writer to the Houses of Parliament in 1813

It may be a matter of congratulation to Englishmen, accustomed as we are to admit the initiative of our American cousins in many matters of business, that the first general use of shorthand in the Courts and in commerce was made in England Mention of the fact may be forgiven even at an International Congress Yet shorthand writing was in use in America alarmingly soon after the arrival of the Pilgrim Fathers, and Americans like Jonathan Edwards, Benjamin Franklin, and Thomas Jefferson were well aware of the importance of shorthand

Many more persons, it may be feared, have expressed regret at not being able to write shorthand than have taken the trouble to learn it Yet the art has been mas-

tered in unexpected quarters It is perhaps no less surprising to learn that the Wesleys were accomplished writers of shorthand than it is to learn of St Augustine's ten stenographers Indeed persons concerned with religion seem to have taken a lead in the matter That famous Protestant schoolman, Richard Baxter, was a shorthand writer So too was Isaac Watts, the writer of hymns But the art has appealed also to persons of a different stamp, who used it not so much for writing speedily as for writing with secrecy That was the motive which led Mr Pepys to write his intimate diary in shorthand in a fruitless endeavour to elude the eye of a vigilant wife And in the eighteenth century it was not uncommon for ladies of fashion to resort to shorthand when they committed their more elaborate indiscretions to paper But the difficulties of the art have deterred many Others beside David Copperfield have had reason to dread "the unaccountable consequences that resulted from marks like flies' legs" Charles Dickens himself was of course an accomplished writer of shorthand both in the Courts and in the Houses of Parliament

The importance of shorthand writing is perhaps greater now than ever before Newspaper reporting holds an increasingly important place The public desires more than a merely descriptive account—it claims to know exactly "what was said" And as newspapers are coming more and more to be regarded primarily, and even solely, as instruments to communicate news, rather than as contrivances to keep discussion on a low level, the importance of the accurate and conscientious reporter tends to increase "Give me the facts", the reader says, "and I will form my opinions for myself" Our best thanks are due to shorthand-writers in the Law Courts and in all places of public meeting It is relent-

less work, and nevertheless the accuracy of their notes and transcripts is to be relied upon It is work which requires prolonged and intensive training, and the efficiency with which it is done is the more remarkable because most speakers are difficult to hear and most places where notes have to be taken seem to have been so constructed as to make hearing as difficult as possible

The calling of a shorthand writer, for all its respectable antiquity, may prove to be yet only in its infancy Can anyone doubt whether it is assured of a prosperous and useful future? As years pass, the public, it may be surmised, will require rather more than less full and accurate accounts of all kinds of proceedings So long as the general rate of acceleration increases rather than diminishes, the services of the shorthand writer will become more and more useful His duty and his opportunity are to insure that inaccuracy shall not be the price paid for acceleration in public affairs

Nor perhaps should it be forgotten, at an International Congress of shorthand writers, that part at least of the foundation upon which the peace of the world may some day be established may be a certain community of fellowship between the skilled practitioners of an indispensable art—an art that makes it possible for mankind, under representative or other institutions, to have access to the materials upon which, in public affairs, their judgement must to some extent be formed

XXVIII

GUILT NEEDS PROOF[1]

A CORRESPONDENT in the United States inquired of me recently whether it is true to say that in England a man is deemed to be innocent until his guilt is proved, or whether, after an arrest has been made, the burden is upon the prisoner to establish his innocence It seems a little odd that at this time of day the question should be asked, especially by a man who has some claim to be called a lawyer But it may be well that it should be quite clearly and plainly answered, and that the implications of the well-settled rule should be understood It is true that it was lately made a grievance that a certain Judge should have explained out of court a point of criminal law But the critic, it may be said without offence, was a gentleman whose ignorance of the criminal law was, to all intents and purposes, co-extensive with the wisdom of Solomon No doubt it would not be right for a judge to express an opinion out of court upon a debatable question of law, especially if the question were in fact being debated, or if it were of such a kind that he might conceivably be called upon some day judicially to decide it But obviously no such considerations apply where the matter is elementary, fundamental, and firmly established It might not be proper to ask a professor of mathematics to volunteer an answer, outside his lecture-room, to some

[1] January, 1937

rare and abstruse question in the sphere of astronomy But there is probably no moral or professional objection to asking him whether two and two really make four, or how many beans make five And, in a country where ignorance of the law is never an excuse for anybody, there seems to be much to be said for the view—repeatedly urged by a Judge of high distinction—that the elements of law should not only be explained in public but actually be taught in schools as a part of the regular curriculum Intelligent children are taught every day the elements of geography, the elements of history, and the elements of grammar The pupils are all on their way to become responsible citizens Why not, it may be asked, the elements of law also ?

The answer to my American friend was, of course, that in England a man is deemed to be innocent unless and until he is proved to be guilty This fundamental principle is never with good reason ignored in any part of the hierarchy of the criminal law, beginning with the policeman on his beat It is not merely that there is a well-established rule, manifestly consistent with reason and good sense, that the burden of proof rests upon the person who is affirming and not upon the person who is denying something There is the further and infinitely welcome fact that in England over a long period of time there has always been a deep and ineradicable regard (not to use a stronger word) for the liberty of the subject Englishmen do not indeed put the word " liberty " into any national emblem or motto, nor erect statues, inscribed with the word, so as to face towards or away from their chief cities But they are passionately devoted to liberty itself, and view with intense jealousy anything which appears likely, even in a minor degree, to impair it Hence (to take a recent example) the deep

and unwavering dislike with which, during the time of the Great War and afterwards, any Regulation under the Defence of the Realm Act was regarded if it appeared to be unnecessary in itself for the purposes of national defence, or if in its particular provisions it seemed to go beyond what was absolutely essential That is a temper, it may be thought, which is as well worth preserving as anything else in the wide world, and it is as natural to an Englishman as the fresh air or the sunshine It is not, therefore, any particular provision or ordinance which gives birth to the doctrine that a man is deemed to be innocent until the contrary is established The doctrine is no more than an individual manifestation of the universal spirit of that common law which has been developed and nourished by many generations of good judgement and good sense

In order to comprehend the full meaning of the doctrine it may be useful to test it by reference to a highly misleading expression which, though it is not wholly extinct, and indeed sometimes reappears in somewhat unexpected quarters, is happily far less common than it used to be The expression is "the benefit of the doubt" The very words seem to convey or suggest that, for some unexplained reason, in circumstances of a particular kind, some sort of indulgence, or leniency, or latitude is to be bestowed upon or granted to the accused person, of which somehow he is for the moment to enjoy the favour But, with all proper respect to those who have cherished the expression, it seems upon analysis to be the unfortunate offspring of nothing more respectable than a bit of loose thinking How can it be the duty of persons engaged in administering the criminal law to dispense favours or benefits in any circumstances whatsoever? The business of the Court is to administer the

law The business of the jury is to give a true verdict, as the juror's oath requires, according to the evidence No question of benefit or favour can possibly arise At the end of the case, as at the beginning, the function of the prosecution is, if the evidence establishes that conclusion, to satisfy the jury beyond a reasonable doubt that the prisoner is guilty of the offence with which he is charged Now, if the total result of the evidence, no matter from what quarter or quarters it be adduced or derived, is to leave the jury in a reasonable state of doubt (not fantastic nor capricious nor sentimental doubt, but reasonable doubt) it is obvious that the prosecution has failed to discharge its burden The conclusion follows from the very definition of the function of the prosecution In such circumstances there is no room for benefit or favour It is the plain and incontrovertible duty of the members of the jury, according to the oath which they have sworn, to acquit the prisoner, for the reason that that is the only verdict which, in the circumstances described, truly accords with the evidence The prosecution fails unless it establishes guilt Obviously it does not establish guilt if it leaves in the minds of the jury a reasonable doubt

On the other hand the function of the defence is very different It may indeed succeed affirmatively in establishing the innocence of the prisoner But that conclusion, though for manifest reasons highly desirable where it is possible, is not necessary The defence succeeds if the reasonable result of the evidence regarded as a whole is to leave in a condition of uncertainty the answer to the question Is the prisoner guilty? Or, to put the matter in a nutshell, the prosecution fails unless it produces certainty, the defence succeeds if it instils a reasonable doubt

There is reason to fear that some confusion may have arisen upon this matter because under a comparatively recent statute—not yet forty years old—a prisoner is entitled to give evidence on his own behalf It is necessary to beware of the utterly erroneous view that, by going into the witness-box, a prisoner undertakes the burden of establishing his innocence He may, of course, in a particular case, clearly succeed in so doing If so, so much the better for him and for his family But the law imposes upon him no such duty and no such task Since (as before) the Act of 1897, it continues to be the function of the prosecution to establish guilt upon the evidence considered as a whole

There are indeed some minor statutory exceptions which do not detract from but rather serve to illustrate the potency of the general rule Where (to take the most conspicuous example) a man is found to be in possession of housebreaking implements by night, the law casts upon him the duty of proving a lawful excuse if he can Yes, but it took a statute to throw the burden of proof that way, and the existence of that statutory provision illuminates and confirms the general principle It was indeed thought, until quite recently, that a case of murder, by reason of the gravity of the crime, fell outside the general rule, and, in certain circumstances, exhibited another exception In other words, there appeared to be no little authority for the statement that, upon a charge of murder, when the fact of the killing had been established, any circumstances of accident, necessity or infirmity must be satisfactorily proved on behalf of the prisoner by way of defence, unless indeed they appeared from the evidence adduced by the prosecution The ground suggested for that view saw that the law would presume that the attack was founded

in malice unless the contrary was shown Examination showed, however, that the authority relied upon for this doctrine was insufficient, and the doctrine has no longer any place in the criminal law It may be well to add, however, that the extinction of that doctrine has no relation whatever to the wholly different topic of a defence based upon an allegation of insanity The well-settled law, derived from the answers given by the judges in Macnaughton's Case, remains absolutely unimpaired It is well that this should be so, because, as every careful observer must be aware, a defence founded upon a plea of insanity has now become the almost invariable make-weight in cases of murder—although not (significantly enough) in other criminal cases The law remains clear, and it cannot be too widely or too plainly understood The law of England presumes that every man is sane and is responsible for his actions If a defence based upon alleged insanity is relied upon, it must be clearly proved—not faintly suggested, but clearly proved And what is it that, in such a case, must be clearly proved? The answer is that three distinct things must be clearly proved to the satisfaction of the jury, namely

(1) That at the time of the committing of the act the prisoner was suffering from disease of the brain,
(2) That because of that disease he was labouring under an infirmity of reason, and
(3) That, in consequence of these two matters, he either did not know what he was about or (alternatively), if he did, he did not know that what he was doing was wrong

It is right that these principles should be thoroughly well understood, especially as this particular topic is often

treated in a scrappy and fragmentary fashion, even by persons who ought to know better

Nor is it by any means solely in the trial of accused persons that the jealousy of English law for the liberty of the subject is made manifest There is a precise code of rules—the Judges' Rules—to regulate the treatment of the accused at the time of arrest and afterwards The utmost care is taken, if the rules are observed—and usually at any rate they are—to prevent the questioning of a person under arrest, and to prevent the improper giving in evidence of any admission alleged to have been made by him An infraction of these rules is followed by serious consequences Moreover, at common law an action for damages lies for false imprisonment or for malicious prosecution It is not suggested that pecuniary damages can always afford adequate compensation in such cases But the existence of the remedy, and the widespread knowledge that it exists, tend to prevent the doing of the wrong

It is, of course, necessary to beware of insular prejudice or complacency, but a man does not need to travel far afield, or to be familiar with many modern languages, in order to realise how salutary are the principles which in this country govern what is not very happily called "contempt of Court" The Court is swift to prevent the publication of any matter which is intended or calculated to prejudice a fair trial A striking contrast is provided by some journals, not printed in the English language, in which the guilt and the antecedents of prisoners awaiting trial are vigorously canvassed And it is exceedingly difficult in England for an innocent man to be convicted and punished Perhaps people do not generally realise how difficult it is In the first place, before arrest is made, some experienced mind, with

knowledge of the consequences, must be satisfied that there is a " prima facie " case Then, before the magistrate, the prisoner has his opportunity, and may cause inquiries to be made If he is committed for trial, he may be acquitted, or if a jury convicts him he may appeal against conviction or sentence, or both, and on grounds of fact or of law His appeal goes to the Court of Criminal Appeal If he appears to have a point, the case is put into the list , if not, it goes to a judge, who reads the full transcript of the trial If the judge refuses leave to appeal, the prisoner can apply to the full Court The transcript is then independently read and considered by each of three judges, and in a proper case leave to appeal is given Afterwards the appeal is heard by three judges, or more, who may quash the conviction or reduce the sentence They may even hear further evidence But of course the Court does not hear further evidence for the purpose of correcting an entirely immaterial mistake in the Court below, which could not have had any effect upon the verdict, and the correction of which could not affect the result of an appeal Finally, when law has been exhausted, there is an appeal to the Home Secretary for the mercy and clemency of the Crown No, it is difficult in England for an innocent man to be convicted and punished

XXIX

SENTENCE OF DEATH[1]

THE thought of taking the life of an enemy, save only in the heat of battle for a noble cause, is so repulsive to the mind of man that the question is always being asked Is capital punishment really necessary ? Sentence of death, as every schoolboy knows, may be pronounced in this country upon a person found guilty of any one of four crimes, namely Murder, treason, piracy, and setting fire to the King's ships or arsenals In cases of the last two kinds the sentence is not in practice carried out Where persons have been found guilty of treason in time of peace the sentence is now commuted But it is otherwise in time of war In 1916, for example, Sir Roger Casement, having been found guilty of treason, was sentenced to death and executed In time of peace, then, the punishment of death is in fact confined in this country to persons convicted of murder Judgement of death cannot be pronounced upon any person who is under eighteen years of age, and since the Sentence of Death (Expectant Mothers) Act, 1931, an expectant mother cannot be sentenced to death

In earlier times sentence of death was applicable in a far wider range of offences So recently as the year 1810 —only a century and a quarter ago—Lord Ellenborough, then Lord Chief Justice, speaking in the House of Lords,

[1] January, 1936

strongly opposed the abolition of the death-penalty in cases of stealing "The learned Judges," he said, "are unanimously agreed that the expediency of justice and the public safety require that there should not be a remission of Capital Punishment in this part of the criminal law" Lord Eldon also directed the weight of his influence against any remission of capital punishment in such cases While the Church as a whole was opposed to any mitigation of the severity of the criminal law, the Bankers somewhat unexpectedly appeared to take a more merciful view In 1830 a Bankers' petition resulted in the abolition of the death-penalty for forgery But, lest it should be hastily thought that the Bankers therefore deserve to be credited with a rather novel motive of mercy, it may be well to make it clear that the reason for their action was derived from alarm at the number of acquittals in trials for forgery, juries being reluctant to find a verdict of "Guilty" when they knew that the prisoner might hang In other words, the petition of 1830, it appears, is explained not so much by tenderness among contemporary bankers as by fears for the safety of their notes and certificates

It was that distinguished lawyer, Sir Samuel Romilly, who was the pioneer of opposition to capital punishment for any other than the gravest crimes The movement for reform gained the support of Bentham, and of Bright, and the great debate upon the matter has continued throughout the nineteenth century to the present day Royal Commissions have met and dispersed, petitions have been presented, and private members have introduced Bills in Parliament The effect of all this discussion has so far been not to abolish capital punishment, but to confine its application in practice to persons found guilty of the crime of wilful murder Few topics

excite keener controversy or more violent partisanship than this topic of capital punishment There are undoubtedly those who regard the death-penalty as the last relic of barbarism But they have not so far succeeded in converting to their view those who are responsible for the maintenance of law and order

The value of the death-penalty to a State consists in its great power to deter criminals from committing the offences for which death is the penalty This value was recognised even by so ardent a reformer as Bentham The point is, if I may say so, extremely well put by that eminent student of philosophy, the late Thomas Hill Green "In the crime," he says, "a right has been violated No punishment can undo what has been done, or make good the wrong to the person who has suffered What it can do is to make less likely the doing of a similar wrong in other cases Its object, therefore, is not to cause pain to the criminal for the sake of causing it, nor chiefly for the sake of preventing him, individually, from committing the crime again, but to associate terror with the contemplation of the crime in the mind of others who might be tempted to commit it And this object, unlike that of making the pain of the punishment commensurate with the guilt of the criminal, is in the main attainable The effect of the spectacle of punishment on the onlooker is independent of any minute inquiry into the degree to which it affects the particular criminal"

Little is to be gained by reference to statistics in an attempt to determine the extent of the deterrent power of capital punishment Figures, which can be employed to prove many things, are employed alternately to illustrate and to obscure this deterrent power So, for example, in Holland, Italy, Sweden and Norway, where

the death-penalty has been abolished, those who advocate its abolition point with satisfaction to figures tending to show that the removal of the penalty has not been followed by an increase in the number of murders committed On the other hand, the case of the State of Arizona, in the United States of America, is cited In that State, in the year 1916, the number of cases of homicide fell to 23, and capital punishment was abolished In 1917, however, the number of cases of homicide rose to 53 In 1918, capital punishment being reintroduced, the number of such offences fell back to 24 Since that time, it is true, the number of cases of murder in the State has increased with painful regularity in spite of the maintenance of the system of capital punishment France, in less degree, has had a similar experience Capital punishment in that country was abolished in the years 1906 to 1908 Upon the re-imposition of the death-penalty there was an immediate and marked fall in the number of charges and convictions for murder But the fact is that critics on either side of the system of capital punishment can get much what they please out of such neat calculations The figures in any country over a series of years may vary for quite other reasons than the presence or absence of the death-penalty They may be affected by such circumstances as, for example, economic depression or civil unrest and disorder Of such indescribably varying influences in different parts of the world statistics take no account

There is one factor, however, which does seem to indicate the great deterrent power of capital punishment Figures are not at hand to show what proportion of persons charged with murder in England are persons who may be said to have belonged to the criminal classes But it is important to observe how few murderers here

are persons of habitually criminal tendencies with long records of previous convictions Among the criminal classes—that is to say, persons known or suspected by the police to be living in crime or by the proceeds of crime—there are very few who commit murder They know of the death-penalty, and they fear it Moreover, it is clear that the actual motives in cases of murder are not as a rule the motives by which hardened or habitual criminals are influenced Robbery, for example, is rarely a motive in murder The records of the Metropolitan Police District of cases of murder or suspected murder of persons over one year old show that in the four years 1931 to 1934 there were no more than six cases where robbery appeared to have constituted the motive for the crime In 1931, out of 23 cases, robbery appeared to be the motive in two cases only In 1932, out of 22 cases, only one accused person was shown to have had the motive of robbery In 1933, out of 23 cases of murder or suspected murder, robbery was not the motive even in a single case In 1934, out of 22 cases, there were three cases where robbery was suspected to be the motive

The truth appears to be that the experienced and dangerous burglar does not carry arms, because he knows that, if he did, he might be tempted to shoot in order to help his escape in emergency There is good reason to believe that the knowledge that sentence of death might result from any such act effectually deters him from it This lesson, which I shall not forget, has been impressed upon me not only by observation, but also by the words of His Majesty's judges, and especially by the late Mr Justice Avory and the late Mr Justice Bray, who had long experience in the criminal courts They pointed the contrast between the comparatively small number of

cases of murder on the one hand, and on the other hand the thousands of cases of burglary and housebreaking It is the novice in burglary who carries a deadly weapon The "old hand" refrains from so doing, although he knows perfectly well that, by shooting the householder or the policeman, or both, he might indefinitely multiply his chances of escape Yet the experienced burglar, with many convictions behind him, knowingly runs the risk of a long term of penal servitude But he shrinks from the scaffold If capital punishment were abolished the remaining penalty would be the penal servitude of which he is willing to take the risk

The figures that have been mentioned for the Metropolitan district corroborate the conclusion established to the satisfaction of experienced observers, namely, that as things stand robbery is rarely a motive in murder, and that ordinarily murderers are actuated by motives of hatred or jealousy, resulting in most cases from a set of circumstances which those concerned would perhaps call a "love-affair" To put it shortly, the root of the matter seems to be "*cherchez la femme*" The suicide of the guilty person is common where this type of motive provides the clue to the crime And the number of suicides among murderers and suspected murderers is remarkable In 1931, in the Metropolitan District, out of 23 cases of murder or suspected murder, the guilty person committed suicide in eight cases In 1932, 11 out of 22 murderers or suspected murderers committed suicide, in 1933, 12 out of 23, in 1934, 8 out of 22 Suicide is a mark of the *crime passionnel*, committed by a person who, as likely as not, has had no connection with the criminal classes It is not a mark of a crime in which robbery and theft are the motives Not a single one of the six persons who between 1931 and 1934 were

charged with murder in London, and whose motive was robbery, committed suicide after his crime What is it that accounts for the fact that robbery so rarely appears as a motive in murder ? Why is it that so few murderers are persons who can be said to have belonged to the criminal classes ? In all the circumstances it is reasonable to infer that capital punishment acts with strong deterrent effect upon that class of persons, burglars and the like, who might otherwise be expected to regard human life cheaply If that be so, the evils of the system of capital punishment are part of the price which society is forced to pay in the interests of public safety

The punishment of death, there is no need to say, is a frightful experience for the prisoner and for his friends and relatives It lays a grave responsibility upon the jury and a most painful duty upon the judge The warders and the prison-mates of the condemned man must suffer greatly, as must (or ought) the executioner himself It is perhaps true that if the guilty man thoroughly understood what penal servitude in a convict establishment (or, it may be, detention for life in Broadmoor) really meant, he might even choose the speedier release But, however that may be, the system of capital punishment is admittedly attended by much suffering Nor is it logical or proper to set against it all the suffering which the murderer's act has caused to the victim and to the victim's relatives and friends Capital punishment need not and ought not to be explained on the ground of the retribution which its imposition affords What it *is* logical and proper to set against the horrors of the death sentence is the suffering which might (and, as many of us believe, would) ensue if that sentence were to be removed from our criminal system, and if the criminal classes were to have the

knowledge beforehand that they could never be called upon to pay with their own lives for taking the lives of others

It is said by critics that the death sentence is attended by the horrible risk that an irreparable injustice may be done to an innocent person To-day the risk can hardly be said to exist The least element of reasonable doubt in the minds of juries suffices to acquit the prisoner Moreover, apart from the revising work of the Court of Criminal Appeal, which is concerned with law, the sentence is subject to the discretionary control of the Executive, as represented in the Home Secretary, which is concerned with mercy In 1931, 58 persons were arrested on charges of murder in England and Wales Of these, three were discharged at the police-court, four were found insane on arraignment, eleven were acquitted, fifteen were found "guilty but insane", six had their sentences commuted to penal servitude for life, one had his conviction quashed by the Court of Criminal Appeal, one had his sentence reviewed and was removed to Broadmoor, and no more than twelve were executed In 1932, 46 persons were arrested in England and Wales on charges of murder Of these, two were discharged at the police-court, seven were found insane on arraignment, six were acquitted, twenty-one were found "guilty but insane" Of the ten who were convicted only four were executed

It is true that in authorising execution the State takes from a man something which it cannot give back But the awful responsibility of depriving a man of his life is undertaken only after every conceivable precaution to prevent error or injustice Finally, it is sometimes urged that, although among murderers there may be different degrees of guilt, there is no difference in the punishment

This statement is only superficially true It ignores the fact that the Home Secretary, in considering the question of remission, may take into account all the circumstances, including the degree of guilt It is said that in cases of murder there should by law be degrees of penal severity It is urged, in particular, that the death sentence should be reserved for cases of carefully premeditated murder and poisoning, which would be called murder in the first degree In practice the defects of such a plan might soon become apparent The question, "Was there careful premeditation?" might well become in the minds of juries as important as the real question they have to try, "Was there guilt?" Juries might easily be tempted to find the prisoner in any case guilty only of murder in the second degree Moreover, such a method would have the effect of keeping capital punishment in force without maintaining what is valuable to the community in capital punishment, namely, its deterrent power A burglar or housebreaker, whose chief dread is dread of the death-penalty, would know beforehand that, so long as he inserted bullets and not arsenic in the body of his victim he need run the risk not of death, but only of imprisonment

The crime of murder consists in the intentional and unlawful taking of human life A penal system must aim, one would think, at preventing murder, and not merely at making less repulsive the methods which murderers employ The arguments of those who seek the abolition of the death-penalty are entitled to respect The death sentence is full of horror It is the price which, as experienced observers are convinced, society must be prepared to pay for the deterrent influence that the existence of capital punishment exercises upon criminals The death sentence, we may well believe, is a horrible necessity But it is a necessity As in the heat

of battle for a noble cause life is taken, so also it needs sometimes in calm deliberation to be taken for a noble cause—the protection of the public In short, if capital punishment is to be abolished, let "messieurs les assassins" begin

XXX

ONE LAW FOR RICH AND POOR[1]

OF the general statements which have passed almost into the currency of a proverb none perhaps is more common, or in certain quarters more popular, than the statement that there is one law for the rich and another for the poor It may be convenient to examine this statement, and to see whether there is any and if so what truth in it A wise man has said that most of the controversies in the world would end as soon as they began if men would only start by defining their terms Now clearly the statement which is to be considered may mean one or both of two things It may mean that the substantive law tends to favour the rich, or it may mean that the cost of obtaining whatever advantage the law offers is so heavy as to exclude or to handicap the poor

There is a well-known story, nearly a century old, of a sentence passed by Mr Justice Maule upon a hawker who had been found guilty of bigamy The prisoner had urged in mitigation that his lawful wife had deserted him and their children, had gone to live with another man, and he had never seen her since The learned judge, before pronouncing sentence, observed to the prisoner that " The law in its wisdom points out a means by which you might rid yourself from further association with a woman who had dishonoured you, but you did not

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think proper to adopt it I will tell you what that process is" The learned judge went on to explain in detail the process of obtaining divorce —

"You should have instructed your attorney to bring an action against your wife's lover for damages That would have cost you about £100 Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro* That would have cost you £200 or £300 more When you had obtained a divorce *a mensa et thoro* you had only to obtain a private Act of Parliament for a divorce *a vinculo matrimonii* The Bill might possibly have been opposed in all its stages in both Houses of Parliament and altogether these proceedings would cost you about £1,000 You do not seem to be worth as many pence, but it is the boast of the law that it is impartial and makes no difference between the rich and the poor The wealthiest man in the kingdom would have had to pay no less than that sum for the same luxury, so that you would have no reason to complain"

The learned judge added that the prisoner had thus wilfully rejected the boon which the Legislature offered him, and, he said "It is my duty to pass upon you such sentence as I think your offence deserves That sentence is that you be imprisoned for one day, and inasmuch as the present Assize is now three days old, the result is that you will be immediately discharged" Those words were uttered in 1845, and the irony of Mr Justice Maule undoubtedly had its effect in expediting a change in the law To-day it is not possible to find any analogy in any department of English law The complaint that there is one law for the rich and another for the poor has no doubt been raised with some excuse in many countries at different periods in their history Dispensations and indulgences, for example, which were

not offered to the poor, have in past times been granted to persons of wealth and rank, and in many times and places an act of wrong which led a poor man to gaol may have been winked at when it was committed by a person of great possessions But one wonders whether in any direction whatever there is in this country to-day ever the slightest foundation for such a complaint

It is a commonplace to say that equality before the law is one of the hall-marks of our free institutions If the suggestion were made that the substantive law tends to favour the rich, it is quite obvious that there is no truth in it, and, indeed, that the truth is rather the other way round Our law consists partly of the common law, partly of the principles of equity, and partly of the provisions of statutes Wherever one looks, it is one and the same law for all persons The law of real and personal property, the law of contract, and the law of wrongs are no more respecters of persons than are the law of evidence and the criminal law But to say that is really to make an under-statement There are whole departments of the law which have been deliberately framed in the interests, and for the protection, of the less prosperous parts of the community Such, for example, are the Factory Acts, and the law relating to dangerous trades, and the series of provisions concerned with public health and housing More than that, in the sphere of taxation the law clearly discriminates in favour of citizens who have the smaller incomes and possessions For many years past persons whose incomes are substantial have been required to pay not only more in taxation but also at an increasingly higher rate So it is with income-tax, so it is with super-tax, and so it is with death duties and estate duties

It appears to be literally true to say at the present time

that, wherever English law makes a discrimination, it is a discrimination in favour of the less prosperous part of the community

But probably those who complain at the present day that there is one law for the rich and another for the poor really mean that, although in theory all citizens are equal before the law, in fact and in practice a poor man is not so well able as his richer neighbour to make use of the advantages which legal procedure may offer The suggestion is apparently that, although the same legal remedies are in theory open to each and every litigant without regard to any means test, in truth and in fact the poor man cannot afford the expense which must be incurred in order that the legal remedy may be attained It may be convenient to examine whether there is any real substance in this suggestion

Now it goes without saying that the administration of the law is not cheap In other words, it is a somewhat expensive proceeding to go to law But the question whether legal proceedings should be indefinitely cheapened is not so simple as it may at first blush appear to be As a general rule it may be said that wherever there is a plaintiff there is also a defendant, and although it may well be that a plaintiff desires to launch his proceedings with as little expense as possible the defendant's point of view may be somewhat different Is it really in the public interest—for the public contains defendants no less than plaintiffs—that the heavy machinery of legal proceedings should be capable of being set in motion at a negligible cost and without serious risk? Prudent lawyers, it may be taken as certain, do all they can to make litigation unnecessary The public, indeed, gets a glimpse of the cases which actually come into court But do people pause to think of the pains which are taken,

and the ingenuity which is employed, to reconcile differences without the expense and the risks of legal proceedings? There is, one cannot help thinking, much to be said for the view that it is not desirable to encourage a multiplicity of actions by making the adventure too cheap

But in order to test the problem quite fairly let us suppose a case where a plaintiff really has, as distinguished from believing that he has, a good cause of action, and his opponent is deaf to reason and will not listen to negotiations Is it right that the plaintiff should be compelled to incur heavy expense in order to obtain that which, upon the hypothesis, is clearly due to him? The answer is obviously, no But what are the expenses which, in such a case, cannot be avoided? The State indeed demands something—perhaps too much, but that is matter for a separate enquiry But, apart from the costs which are payable by way of Court fees, there are the costs incurred in the employment of solicitors and counsel Yet here it is too often forgotten that the costs of solicitors are liable to taxation, and the fees of counsel are very much in the control of clients themselves If they insist upon the services of eminent counsel they must expect to pay accordingly It is a commonplace, however, to say that there are many scores of barristers in the Temple, and in the large cities throughout the country, who do their work perfectly well for moderate fees And if the right side wins, as is commonly the case, the successful party recovers his reasonable costs from his unsuccessful opponent

But there is a further and important addition to be made To say nothing of the fact that it is always open to the poor litigant to appear in person, in which case he can always count upon the attention and the help of the

Court, there is now and has for some time been in existence a valuable body of regulations which govern what is called the Poor Persons' Procedure The Poor Persons' Rules, it may fairly be said, enable the poorest litigant to prosecute or to contest his case without the payment of fees The plan appears first to have occurred to the minds of certain lawyers who were engaged in social work in University Settlements in the East-end of London, and in Toynbee Hall, and who observed injustices that were allowed to pass because literally no money at all could be found by the wronged persons in order to cover legal costs These public-spirited men set about, in the unselfish mood of social reformers, to right an obvious wrong The result is to-day that a Committee appointed by the Law Society, or by a Law Society outside London, is now empowered to certify that a person is entitled to the benefits of the Poor Persons' Procedure

In order to receive such a certificate a man must not possess more than £50, or in special circumstances £100, excluding wearing apparel and working tools, or his usual income must not exceed the rate of £2 a week, or in special circumstances £5 The Committee must be satisfied at the outset that the man has reasonable grounds for being a party to legal proceedings, and then a solicitor is nominated who conducts the case, and it is to be observed that the work of the solicitor and the barrister in a Poor Persons' case is done voluntarily and without fee It is a fact that of the applications which are made to the Law Society by persons desiring to proceed under the Poor Persons' Rules, by far the greater number are granted Nor is it surprising that the work of the Law Societies in relation to Poor Persons' Procedure has in recent years steadily increased in volume In 1924, for

example, the total number of applications in London was 1,180, and outside London 2,077 But the latest annual returns which have been published show 2,792 applications in London and 4,074 in the country outside London

It is unfortunately true that the vast amount of charitable work which is done in this way by solicitors and by members of the Bar does not receive the appreciation it deserves It is no uncommon event for the hearing of a Poor Person's case to take a series of days—days which, from the merely professional point of view, must be written off as a loss in the diaries of the professional men concerned Moreover, considerable sums in damages have been recovered by Poor Persons in these proceedings, and where it is necessary in the interests of the client the case is carried from the court of first instance to a higher court The legal profession would, of course, be the last in the world to take credit for doing this work without fee or reward Its members accept the work, and accept it gladly, as a duty, and it is shared not only by the younger members but by many of the most distinguished members of the legal profession How often, in like manner, in an important criminal case one finds that the work is done, and admirably done, not only at Assizes but also in the Court of Criminal Appeal, by able and experienced members of the Bar who interrupt their regular professional work in order to give a poor defendant the benefit of their experience and skill No credit is asked, but assuredly honour is due

The conclusion of the whole matter appears to be that, whatever may have been the case in some times that are now past and gone, at the present time the substantive law makes no discrimination which is unfavourable to the poor man, while so far as the conduct of

actual litigation is concerned the litigant of small means has ample opportunity of having his case presented, and adequately presented, either at slight expense, or at no expense at all And in court all litigants stand upon the same footing Whether a man is represented by counsel or not, and whether he is represented by eminent counsel or not, he is entitled to receive, and receives, the same attentive hearing, and if his case is sound he has nothing to fear at the hands of judge or jury On the contrary, he will find a strong desire to see justice done It may well be that much still remains to be done There have lately been many improvements, and there is room for more But those who are disposed to criticise adversely might perhaps pause to reflect that they are dealing with no simple problem A mere mood of benevolence is not in itself a sufficient equipment It is necessary to remember that in litigation there are more parties than one, that it is wrong to gratify the plaintiff to the detriment of the defendant, and that, while sympathy is a most commendable quality, it never appears in a less attractive guise than when it is practised at the expense of somebody else

XXXI

LAW AS INSURANCE[1]

THE impulse to reform is so usual and so amiable an ingredient in human nature that almost everybody is at almost all times ready and willing to reform somebody else A favourite topic, or butt, for this kind of attention has long been afforded by the Law Courts "Come now," says one idler to another, "as we have nothing better to do, let us get busy and reform the Law Courts" And so (as the spiritual pastors and masters love to say) the cricket correspondent who is out of work in the winter, and the football expert who is out of work in the summer, and a host of other people who find time a little heavy on their hands, are prodigal of schemes to procure the better administration of justice, or at any rate of law

The inimitable Mrs Bennet, in "Pride and Prejudice," complained to her husband that he had no compassion on her poor nerves "You mistake me, my dear," Mr Bennet replied "I have a high respect for your nerves They are my old friends I have heard you mention them with consideration these twenty years at least" For fifty years at least persons of mature age have heard the busy amateur mention with consideration what he calls law reform Of course, the "mention" is not always quite so innocent as it looks "There are never wanting," as Francis Bacon wrote, "some persons

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of violent and undertaking natures who, so that they may have power and business, will take it at any cost" Perhaps he had in mind the activity of persons of that kidney when he wrote elsewhere, "It is but like the thorn and briar, which prick and scratch because they can do no other" But it would not be right to waste time over these bold, bad men Let us rather direct our attention to one or two modes of real reform, which are easily attainable, and which could not fail to be useful

Now, in order to approach the matter in the right spirit, it is manifestly essential to appreciate clearly the function which is, or ought to be, fulfilled by the daily administration of the law in the Law Courts It would obviously be too superficial a view to think that its function is to provide a lucrative arena for the talents of a group, larger or smaller as circumstances may determine, of brilliant young men Nor would it be an adequate explanation, even for controversial purposes, to suggest that its function is to offer rewards and dignities to a smaller group of lawyers who are thought to have deserved well of some political party, or whose seats in the House of Commons can conveniently, at some moment or other, be vacated Is not the true view rather that the regular and public administration of the law constitutes a colossal system of national insurance, to the end that the whole body of citizens may go about their business with a reasonable sense of security and tranquillity?

Suppose that some intelligent member of the public—a juryman, for example, who has half a day to spare—were to look into a series of courts in order to observe what is actually going on in the course of a day's ordinary work In one court he may find a brother trader seeking to recover, at the hands of a judge and jury, damages for

a breach of contract to deliver goods or to pay the price of goods delivered In another court he may find a shipper or a merchant and a group of underwriters seeking, at the hands of a judge alone, the true interpretation of some disputable words in a charter-party, a bill of lading, or a policy of marine insurance In a third court he will almost certainly find a person, or the relatives of a person, who has suffered bodily injuries in a collision between two stationary motor-cars, each on its proper side of the road, and each keeping a good look-out, endeavouring to convince a judge and a jury that the liability rests upon the defendant, and to collect suitable compensation in the way of damages In yet another court he may see a prisoner in the dock, who has been convicted of some indictable offence, striving for his conviction to be quashed or for his sentence to be reduced

What is the net effect of an inspection of this kind? What is the total impression which the visitor takes away with him? Is it not the conclusion that, if contracts are broken, damages may have to be paid, that, if a wrong is committed, the wrongdoer may have to provide compensation, and that, if a crime is perpetrated, the offender may be punished? And is not the most important consequence of this regular, day-to-day, public administration of the law, both civil and criminal, and the diffused and prevalent knowledge of it—whether that knowledge be gained by actual observation or by the reading of the news—that a condition of affairs is brought about, or at least encouraged, in which, upon the whole, crimes are not perpetrated, wrongs are not committed, and contracts are not broken but duly performed?

Now, if that is really the true view, it is not the

individual case which is of vital importance What is vitally important is that there should always be, and be known to be, in operation a system of machinery, both in civil and in criminal matters, which tends to ensure that, if certain acts are committed that ought not to be committed, unpleasant consequences may be expected to overtake the negligent or culpable person It would indeed be grievous and wrong to suppose that men fulfil their promises, or abstain from wrongdoing, only because they fear the consequences of default or crime But, for such a being as man in such a world as the present, who will deny that the certainty or the probability of those consequences is a wholesome and controlling fact ?

The State, as the philosopher wrote in words that are immortal, came into existence in order to make life possible and exists in order to make life good Part of the means to that end, as the good sense of mankind has perceived from the earliest times, is the fearless and impartial administration of a system of law both in civil and in criminal causes That system of law is not an end in itself On the contrary it is only a means to an end—the end, namely, that the citizens of the State may pass their lives, and conduct their business, in circumstances of reasonable certainty and security, free from the fetters and hindrances of apprehension and alarm, whether for their personal safety or for the normal course of their ordinary transactions In other words, is it not the true conclusion that the administration of the law is essentially neither more nor less than a colossal system of public insurance ?

The individual litigant who happens to be compelled to commence, or to defend, an action for damages for breach of contract (for example), or for the commission of a wrong, is in that respect an unfortunate person A

lawsuit is almost invariably a misfortune, for one or both of the parties to it, and that is one reason (among others) why humour in court, although it may sometimes seem a tempting momentary relief from monotony, is nearly always intolerable Is it not true to say that the parties to a litigation are persons who, unhappily for them, are compelled to exemplify in a particular case a kind of remedy or palliative that derives its value from the fact that it is, and is known to be, of universal application? They are affording, to their misfortune, typical instances of the working of a system which experience proves to be necessary for the welfare of the body politic

But, if that be a true analysis, how can it be right and fair that the cost of maintaining the system should fall so heavily upon the individual litigants themselves? They ought rather, one would think—always provided that the litigation could not be avoided or averted—to be pitied than penalised Some part, perhaps a great part, of the expense is within the volition and the control of the individual litigants themselves It is idle to inveigh against the costs which are charged by solicitors or the fees which are payable to counsel Solicitors, in almost all cases, thoroughly well earn the costs which they recover, and those costs, it should never be forgotten, are subject to taxation And with regard to counsel, if parties to a suit will insist upon having the services of one or two members of a small group of fashionable counsel, they must expect to pay for the luxury There are scores of able barristers in the Temple whose fees are by no means exorbitant, and it would be extremely interesting to ascertain, if it were possible, in what percentage of cases that are tried the result depends in any real sense upon the personality

of the counsel retained It would be a strange commentary upon the competence of the Bench if the percentage were, as it certainly is not, high But so long as a tiny group of fashionable advocates are overwhelmed with a mass of cases, it is natural that, in order to protect themselves, and to keep their work within something like manageable compass, they should require remuneration on a high scale If luxuries are desired, they must be paid for

But there is an important element in the costs of all litigation which is not within the control of the parties That element is constituted by the costs which, usually in the form of payment for stamps on documents and Court fees, are payable to the State itself Now this is a definite matter of urgent public importance, and it well deserves the most exact investigation It has from time to time been suggested, as it has long been suspected, and not long ago it was definitely stated by the able and experienced President of the Law Society, that the administration of justice in England is carried on by the State at a profit That is a proposition which appears to call for the closest inquiry If it is correct, it must mean that the unfortunate litigants who are called upon to exhibit in their own individual cases the operation of the general machinery of law are bearing an excessive and unwarrantable burden If it is not correct, its inaccuracy should be made manifest

There is, as has been indicated, much to be said for the view that the general body of the public might properly be called upon to make a fair annual contribution to that system of public insurance which constitutes the public administration of the law In other words, it does not seem fantastic to cherish the belief that, if the matter were clearly explained to the public by somebody

able to attain (let us say) to the average standard of an upper fourth form, the public might be willing to contribute for the administration of the law an amount equivalent, for example, to the cost of one third-class cruiser

But, however that may be, what possible justification could be offered for a system whereby the public administration of the law was carried on by the State at a profit? Clearly the first step should be—should it not?—fully and fearlessly to ascertain the facts To this end it might be highly desirable to set up an absolutely independent Committee, not to be presided over by a "first-class business man"—an expression of so much ambiguity that to-day it rather provokes the sense of humour—but a Committee of three persons, namely, an experienced accountant, an experienced barrister, and an experienced solicitor Let a body of that kind get to work and find out, over a period (say) of three years, the exact amount received by the State in respect of civil litigation at the Royal Courts of Justice and trace with absolute clearness the ways in which that amount is dealt with or expended The task would necessarily involve an examination of all the payments which are debited to the administration of the law and perhaps an inquiry as to the times when, and the ways in which, those payments came to be what they are It is a task which need not occupy any long time, nor involve any considerable expense, and its results might well prove to be in a high degree illuminating and salutary

XXXII

MR JUSTICE AVORY[1]

THIS term, and many terms to come, are darkened for all of us by the shadow of an irreparable and indescribable loss It would be an impertinence to praise Mr Justice Avory or to attempt an inventory of his shining attributes Happily, after his thirty-five years at the Bar and his twenty-five years on the Bench, he was still young when he died—young in everything but the mere passing of the days Great as a lawyer, an advocate, a Judge, and a human being, he dedicated and re-dedicated himself to the service of his fellow men Is it not right to say of this dear friend of so many of us that he grasped with his whole strength great and simple truths, that his life was one of sincerity, unselfishness, and suffering, that few men ever had a clearer insight into mankind, and that he kept up his indefatigable courage and energy to the last? Mr Justice Avory spoke the truth and did to others as he would they should do to him When we think of his diligence and self-control, his force of character, and his temper of greatness, his complete devotion to the ideas of justice and truth, we have a mournful feeling that there is no one in all respects able to take his place Yet, though he has passed into the unseen world, we refuse to believe that he will ever

[1] At the Royal Courts of Justice, 18 June, 1935

really pass away He fought a long and brave fight, and his sweet example remains

"And o'er the plain, where the dead age
Did its now silent warfare wage—
O'er that wide plain, now wrapt in gloom,
Where many a splendour finds its tomb,
Many spent fames and fallen mights—
The one or two immortal lights
Rise slowly up into the sky
To shine there everlastingly,
Like stars over the bounding hill"

XXXIII

"HIS MAJESTY'S JUDGES"[1]

MR PRESIDENT, my Lords and Gentlemen,—On behalf of my distinguished colleagues no less than for my own part, may I thank the last speaker for the gracious way in which he proposed this toast, and all of you for the apparent friendliness with which it was received It is, I need hardly say, a privilege as well as a pleasure to be here this evening, and to join in doing honour to Sir Harry Pritchard and Mr Arthur Thorpe, who are held in such high regard in the greatest of all professions, and at whose hands every one of us, in various ways, has received so much kindness

Only three months have passed since the sudden death —a few miles from here—of one of the greatest Judges in the history of England Three remarks of the late Mr Justice Avory return at this moment to my recollection One of his last public acts was to propose a toast at the Mansion House He began by saying, "We all know what kind of wine needs no bush and this toast certainly needs no butter" Another remark he made to me some years ago shortly before I had to respond, at the Guildhall, to the toast of "His Majesty's Judges" I had asked him what he thought I should say about them, and he replied "Oh! say that we are well satisfied with the universal admiration in which we are

[1] At the Law Society's Dinner in Hastings, 24 September, 1935

held" I followed that suggestion, though a natural caution prompted me to interpolate the word "almost" before the word "universal" A third remark was made one day when we were last on Circuit together Our morning walk had been instructed, not to say monopolised, by a local magnate, who joined us uninvited and talked incessantly When at length he had gone and we were going upstairs in the Judges' Lodgings, Avory said to me "I do like dogs," and, when I asked him what the particular reason was, he answered, 'They talk so little"

Well, we are about as likely to get another William Shakespeare as another Horace Avory Remembering and sharing his liking for dogs, I will not detain you with many words I am sure you have all observed in the two outstanding occasions of the past few months, the tributes which, naturally and necessarily, have been paid to the province and the achievements of law In the celebrations of the "Silver Jubilee" there was hardly an address or a speech, a sermon or a hymn, which did not give first place to the blessings of justice and freedom More recently, at Geneva and elsewhere, is not that which is being sought precisely this—that the force of law may be substituted for the lawlessness of force? You and I, whose happy fortune it is to spend our days in serving the public in the sphere of law, may perhaps gather some encouragement, and even some lessons, from those facts It is not necessary to dwell upon them You observe also that the title of the Judges is "His Majesty's Judges"—not the Judges of anybody else It is from the King himself, not from a Government, still less from a Government Department, that my colleagues and I receive our Letters Patent It may be well to remember that fact, for other reasons

and because, if you were to make a search of the territory lying between Westminster Abbey and Temple Bar, you might possibly discover quite a number of half-hearted Hitlers and miniature Mussolinis

Law and justice are the watchwords You cannot otherwise have freedom It might be useful sometimes to remind persons who have forgotten, or who never knew, that there is still in existence an instrument called the Act of Settlement, and that the independence of the Judges is the protection of the people Let me add just two things more Part of the price I pay for holding the rather coveted office of Chief Justice is that, from time to time, innocent journalists, playing unsuspectingly into the hands of persons to whom the epithet does not apply, are good enough to predict for me an early retirement The responsible authors of these delicate and amusing attentions must really learn to be patient Some day perhaps they, or their friends, or some of them, may get what they want But I hope, as I intend, that they will have to wait at least another twenty years, and in the meantime nobody who looks forward, however earnestly, to Memorial Services can predict with reasonable certainty who will be the mourners and who will be the dear departed The other thing I should like to add is that my distinguished and beloved colleagues deserve, and more than deserve, all the praise that has been uttered concerning them It may be that Pope had them in mind when he wrote the pleasant lines —

> "Careless of censure, nor too fond of fame,
> Still pleased to praise, yet not afraid to blame,
> Averse alike to flatter or offend,
> Not free from faults, nor yet too vain to mend"

XXXIV

CENTENARY OF THE LAW SOCIETY[1]

MR PRESIDENT, my Lords, and Gentlemen,—On behalf of His Majesty's Judges I should like to thank the proposer of this toast for the kind words which he employed, and all of you for the kindness with which you received them It is indeed a great delight to be present at this memorable celebration of a hundredth anniversary During the past hundred years, or a considerable part of them, many of us have had the good fortune, from time to time, to receive invitations to dine with the Incorporated Law Society By no means the least agreeable feature of those invitations was the invariable announcement, contained in two words, and exhibited with suitable prominence,—"No speeches" But to-night, for reasons which in some quarter have evidently appeared sufficient, that attractive and indeed humane maxim has been violated The existence of an exception proves the existence of a rule But it will probably be in accordance with the inclinations of our hosts, as it will undoubtedly be in accordance with the inclinations of their guests, that everybody should keep close to the spirit of that maxim, or at least as near thereunto as he can safely get

I will therefore permit myself only two remarks In the first place, on behalf of His Majesty's Judges I should like to tender our warm congratulations to the

[1] At the Centenary Banquet of the Incorporated Law Society

Law Society, and to wish it many happy returns of the day The fact that the Society has reached its hundredth anniversary is a fact of great moment But what is far more momentous is the further fact that throughout every year of that hundred the Society has been doing admirable work in its two great purposes of promoting professional improvement and of facilitating the acquisition of legal knowledge There is not much to be said for the view that the highest good in any profession consists in having a register from which you can be struck off Nevertheless, these things are not without importance, and it is pleasant at last to see the Law Society master in its own house Long may it thrive, and long may it perform with unimpaired efficiency the great and manifold duties which it has made its own

In the second place, let me add one remark concerning His Majesty's Judges When I think of my distinguished colleagues I am filled with a sense of personal humility and corporate pride A few days ago, in another place, some of us heard, or even offered, a prayer that His Majesty's Judges " may boldly, discreetly, and mercifully fulfil their duties " In the case of my illustrious colleagues that prayer has been, is being, and will be answered Depend upon it, there never was a time when the faithful and unfettered exercise of judicial duties was more profoundly important In this country, as the fruit of the labours of wise men in the past, we enjoy the equal and impartial rule of law Never let us be tempted to sacrifice that heritage, or to entertain, to connive at, or to coquette with any alien notions of what is called " administrative law " which, while they recognise indeed that the Judges are, as they must be, independent of the Executive, cherish the heresy that the Executive is to be somehow independent of the

Judges If and when and whenever that heresy appears in our midst, whether it takes the form of ingeniously drafted clauses, or whether it takes the more amusing form of bureaucratic pretensions, or whatever form it may take, all who love British justice—and among them, not least, the Law Society—will assuredly deal faithfully with it

XXXV

CENTENARY OF THE CENTRAL CRIMINAL COURT[1]

MY Lords and Gentlemen,—It is not easy to connect the idea of congratulation with a Criminal Court, except indeed upon some occasion when an innocent defendant has been triumphantly acquitted Nor is it easy to discern any particular merit in the mere fact that, since the Central Criminal Court Act of 1834, a hundred years have gone by Time passes, and we cannot prevent it, even if we would But there is, I am quite sure, solid ground for satisfaction in the real improvement which, during the past hundred years, has been made in the administration of the Criminal law The terms "Old Bailey methods" and "Old Bailey practitioners" have, except as a matter of unpleasant history, wholly disappeared The more agreeable history of the century which we celebrate to-day, while it exhibits a large and increasing extension of the jurisdiction of this wonderful Court—without doubt the greatest Criminal Court in the world—exhibits no less an increasing degree of fairness, of patience, and of humanity throughout the whole field of Criminal law and practice It would indeed be hard to imagine a more remarkable contrast than that which is to be observed between the present work and methods and

[1] Remarks at the Centenary celebrations of the Central Criminal Court, 1934

temper of this Court and the harshness, the hastiness and the downright brutality of the early part of last century, with its terrible records of sentences of death, and sentences of transportation, and callousness towards youthful offenders convicted of trivial offences

Let us beware of attributing the change to mere tendencies, as they are called, or the spirit of the age The change is largely due to the unceasing efforts of individual lawyers and not least to those whose names will always be connected with the history of this Court—names like Hardinge Giffard and Poland, Avory and Mathews, Clarke and Fulton, Besley and Travers Humphreys, Bodkin and Muir It was not in vain that over forty years ago the Bar Mess of the Central Criminal Court was founded as a result of the public-spirited work of men whose names will never be forgotten in the profession of the law, and whose good deeds are to be commemorated elsewhere to-day

Let me add, what you all know, that among those names, none stands higher than the name of Avory, and it is indeed a delight to all of us to see here this morning Mr Justice Avory, full of years and honours, the great master of the criminal law, and—to everybody who in any sphere is engaged in the work of the law—an example, a pattern, and an inspiration

XXXVI

AT THE GUILDHALL[1]

MY Lord Mayor, my Lords and Gentlemen,—There is high, and indeed ecclesiastical, authority for the proposition that human nature is human nature, and that, so long as human nature continues to be human nature, human nature will be human nature Hence, among other things, there is never wanting a due supply of causes, civil and criminal, to be determined by my distinguished colleagues of the High Court, and especially perhaps of those causes which arise from collisions between two stationary motor-cars, each on its proper side of the road and each keeping a good look-out In general, as I understand, the suitor is not dissatisfied with the judgement, or at any rate he has had enough of it In cases of serious dissatisfaction he does not, as a rule, throw stones at the Judge Rather he adopts the milder and more tranquil course of appealing to the Court of Appeal There the judgement, if it is wrong, and still more if it is thought to be wrong, may be reversed Even the judgements of the Court of Appeal can be taken to the House of Lords There the judgement is always right, because it cannot be reversed If in spite of, or because of, its correctness, it is gravely inconvenient, it can be turned upside down and inside out by legislation

Such is our admirable system, the envy of less favoured

[1] Reply to the toast of His Majesty's Judges, November, 1933

nations, and it produces that spirit of public contentment which causes law and lawyers to be regarded with so much affection It remains only to add that my distinguished colleagues in all Divisions of the High Court are, most rightly, very difficult to please But they are quite satisfied with the admiration in which they are universally held On their behalf it is my pleasant duty to return thanks for the kind way in which this toast was proposed, and for the marked composure with which it has been received

XXXVII

THE YOUNG OFFENDER[1]

THERE is a pleasant sentence of Juvenal's, "*Maxima debetur puero reverentia*," which being interpreted is "you owe the highest respect to the young" And you all remember the well-known passage in the third book of "The Republic" where Plato is speaking of the education of those that are to be the guardians of the State "We would not have our guardians," he says, "grow up amid images of moral deformity, as in some noxious pasture, and there browse and feed upon many a baneful herb and flower day by day, little by little, until they silently gather a festering mass of corruption in their own soul Let our artists rather be those who are gifted to discern the true nature of the beautiful and graceful, then will our youth dwell in a land of health, amid fair sights and sounds, and receive the good in everything, and beauty, the effluence of fair works, shall flow into the eye and ear, like a health-giving breeze from a purer region, and insensibly draw the soul from earliest years into likeness and sympathy with the beauty of reason" Add to reflections like these the truth or truism that society does not consist of classes but only of individuals, and you have the temper in which, it may be thought, the tremendous problem of the treatment of the young offender may suitably be approached

[1] Clarke Hall Lecture, 24 May, 1935

There are indeed good reasons why the young offender should receive special treatment It is clear, for example, that the younger an offender is the more hope there may reasonably be for his reformation and the better the prospects of reformation More than that, it may perhaps be agreed that young offenders tend to suffer from far greater confusion of motive for their acts than is to be found in their elders It is sometimes said that, while it is often difficult to decide between what is expedient and what is inexpedient, it is seldom difficult to distinguish between right and wrong To the young man or boy this distinction may not always be so simple Most boys probably spend some little part of their lives in reflecting with grave perplexity upon the problem Where does mischief merge into something worse? And if conscience is said to be the arbiter, must it not be admitted that a reference to his conscience on the part of a boy who perhaps has been brought up in a difficult or unhappy home may lead to fruitless or errant decisions? Young offenders also tend to suffer from unusual sensitiveness and fear The fear of prison and of the Court is greater because these things are unknown or little understood And is it not true that children and young people are readily affected by the company which they keep? Long and enforced association with criminal companions may have quite disastrous consequences for a young man In this respect it may be feared that the imprisonment of youths sometimes has the effect of making rather than reforming offenders Also the young offender is—is he not?—more particularly the creature of his surroundings and may plead with greater force than others that he is affected by the circumstances of his upbringing Who will deny, for example, that the horrors of unemployment bear with special

hardship upon a boy or a girl who has just left school? A boy who is doing nothing, as we know, is probably getting into mischief

To look at the matter from a slightly different angle, the boy or the girl below the age of 21 is in English law a minor, and a minor has no rights which can be personally pleaded in any Court against another citizen The parent or the guardian must sue on behalf of the minor if any wrong is alleged to have been done to the minor Is it not, therefore, a matter of "*noblesse oblige*" that as the State disregards him as a suitor, the State should exercise a special care over his interests when he is the object of a criminal charge? Especially perhaps must this be so, in a country in which fair play is a criterion of justice, where the young offender has been denied or bereft of the ordinary influence of a good home If he stands at the bar, homeless and untutored, ill-nourished and ill-taught, an English lad with a heritage of poverty and neglect, the State must needs assume an attitude that is not grandmotherly but at least paternal We owe something to all minors, we owe a great deal to the children without a chance And it is probable that nearly every offender, however old and hard, having been once a child, was once a defendant in a Juvenile Court

It is said by those who are conversant with these matters that, when last an enquiry was undertaken into the earliest antecedents of some thousands of practised offenders, it was ascertained that 60 per cent of them had been arraigned for their first offence before they reached the age of sixteen A figure like that throws into sharp relief the critical importance of the present problem If the young offender is rightly understood and wisely handled when he is but a novice in crime, still immature

and unpractised, how many human lives may be reclaimed from waste, how many crimes of an idle manhood may be averted? Those whose duty it is to sit in Criminal Courts see so often in the dock a man who has preyed upon society for 20 or 30 years, with spasms of dishonesty and violence, and long intervening periods of costly ineffectiveness in prison He has become almost a hopeless liability Yet once, like every child, he was a potential asset It is established by the official statistics of the Home Office that in recent years the number of young offenders brought before Juvenile Courts has increased It becomes, therefore, an imperative claim that the most highly skilled attention should be given to the needs of the novice in crime, otherwise the present increase in the juvenile offenders of to-day must inevitably be reflected in an increase of adult recidivist criminals—back-sliders—between 1950 and 1960 Yet it would be quite another thing to say or to suppose that the right treatment of the young offender renders only a negative service to the State What is desired is not merely to prevent the manufacture of criminals, but actually to multiply the number of good citizens On Empire Day, as on Armistice Day, the public is probably not unmindful of the tragic surgery and blood-letting of war that deprived our English tree of a million young and healthy branches But some of the youngsters that come within the clutch of the criminal law have qualities of courage and initiative which, rightly developed, might well fit them to take the places of those that have been lost In like manner you may see in the growth of the Empire many exploits of daring not utterly different in kind from the dare-devil designs of some young offenders There are those, it might be said, among the great explorers who might

have been charged with "breaking and entering," while some of the most famous sea-captains have sometimes perhaps, in the course of their navigation, been "loitering with intent" There are indeed from time to time adventurous boys in the dock who should be at sea, there are those found wandering who should be offered a hill of adventure that they may climb

But of course it is necessary to beware of misplaced leniency in the treatment of the young offender merely because he is young Neither in pity nor in anger should he be judged, but rather with justice and understanding The spectacle which he presents in the dock may well excite compassion in any human heart—shy, frightened and inarticulate, or perhaps stupidly sullen and defiant, wearing his best clothes and his worst manner—who would not regret that so young a being should stand at the bar of justice with so grave a record against him? But behind that unhappy and restless figure there stretches a miserable landscape maybe of an overcrowded home, disunited parents, haphazard training, poverty and unemployment So false is his scale of values that he had risked everything for a packet of cigarettes, so poor his self-control that a moment of passion or a whim of curiosity has jeopardised his liberty for many years But pity is an inept sentiment that has little place perhaps in the administration of the law Justice should indeed be tempered with mercy, but ought it to be watered with pity? Kindness that proceeds merely from compassion may sometimes be the greatest cruelty to the offender and to all who will be the victims of his wrongdoing Ought not the course which is taken to be directed not so much by sorrow for the young offender as by belief in him and by the desire to make a man of him, a goal to which the surest road may not always

coincide with his own wishes or with the wishes of his parents? One of the dangers of mere pity is that it sometimes induces self-pity If it be suggested to the offender that you are sorry for him, and think he has not had a fair chance, you may lead him to a mood of self-pity, which may do more than anything else to weaken his moral fibre Is there anything more fatal to the recovery of a bad start than a prevailing belief on the part of a youngster that it is not entirely his fault, that he has been unlucky and that he is to be pitied rather than punished? To deal intelligently and effectively with young offenders is not to be soft, "sloppy" or sentimental, but rather to be determined to ascertain the cause of the default, to weigh the possibilities of the defaulter, to examine his circumstances, and if possible to prescribe a treatment that will make the best use of all his possibilities

It is well—is it not?—to consider with care the causes of juvenile delinquency, for it is only after a fair appreciation of the ways that have led the offender to a criminal Court that you can rightly point out a better road for the future No two human lives are the same Human circumstances are infinitely various As there is no royal road to success, so also there may be no inevitable slope to failure If you were bold enough to reduce the individual variety of many thousands of young lads into a single sentence, you might perhaps be content to say that the young offender is a boy whose character or temperament had been badly adjusted to his environment, though you might dislike the word A convenient phrase may explain why two brothers, fated to the same surroundings, fare so differently Under the like stress and the like temptations one grows to be an honest worker, the other to be a criminal The temperament

of one perhaps accepted and fitted in with the surroundings common to both, the other reacted dangerously away from them, and yielded to temptation which the first had successfully faced Similarly you may observe how two boys or girls of like temperament may in different surroundings achieve very different results. One of them, exposed to the stress and strain of a crowded house, with the burdens of poverty and unemployment heavy upon him, may have recourse to crime in early years, the other in a sheltered home in town or country may have a variety of opportunity both for occupation and for leisure, and find in life a satisfaction for his individual desires and capacity

Is it, or is it not, true to say that there have been in this country at least two significant movements that have affected this question of temperament and surroundings? In the first place the demand for what is called a higher standard of life has penetrated down through the 'teens to the child at school He wants more—more to eat, to do, to dare, to conquer Change, movement, pace and variety seem very often to be important constituents of modern happiness—if anything is modern except the internal combustion engine The youngster makes a great claim on life, greater than his modest earnings can afford He is able to drive a car some years before he can afford to own one His earning capacity is for ever behind the cost of the life which he thinks he is impelled to lead So there sometimes arises a grave temptation to acquire dishonestly what he has come to regard as a necessary of normal life

Another change which has affected this adjustment of temperament to surroundings is a marked change that seems to have occurred during this century in the basis of what are called childish "inhibitions." During

the nineteenth century it will hardly be denied that the notion of Hell, the prospect of punishment and the emotion of fear, were often employed to supply a reason why boys and girls should be good rather than bad All this teaching of the gospel of rewards and punishments seems now to have been thrown overboard in school and home, church and chapel Or, to vary the metaphor, the earlier foundation of ethics has been kicked away by an impatient generation, eager for a higher ideal To-day parents and school teachers, club leaders and scout-masters, laymen and clergy alike seem to point the young within their charge to a higher ideal, to a better reason why they should be clean and honest But the new reason why boys should not lie and steal is taught to a limited number only, and for many the old ethical foundation has probably been taken away before the new one has been securely established in its place

Now it is not at all fanciful to discern an almost dramatic change in the attitude of the English Court of Law to the young offender as between the nineteenth and the twentieth centuries To take an illustration, the enquiring eye can find, for example, in an old Register still existing in Stafford Prison, entries of which these are specimens, chosen for a period beginning about a hundred years ago

Year	*Name*	*Age*	*Offence*	*Sentence (Transportation)*
1837	Matilda Seymour	10	Stg one shawl and one petti coat	7 years
1843	Wm Careless	16	Stg one spade	10 years
1843	Wm Ashmole	14	Stg one book, property of the Guardians of the Poor	7 years

Year	*Name*	*Age*	*Offence*	*Sentence (Transportation)*
1834	Geo Saxon	12	Stg one gold watch	7 years
1834	Wm Biglen	14	Stg one silk handkerchief	7 years
1834	Thos Tow	10	Stg one ass	7 years
1835	Geo Bould	15	Stg one piece of mutton	7 years
1835	Thos Bell (*1st April*)	11	Stg two silk handkerchiefs	7 years

Compare and contrast this grim, heartless and desperate attitude with the way in which Sir William Clarke Hall would have dealt with a youngster of that age in his Juvenile Court He would gladly have spent a patient hour or two, unravelling the tangled skein of early troubles, searching slowly rather than birching quickly, and trying, after guilt had been established, to discover the right treatment for the individual young offender The fact appears to be that in the last century the main concern of the Court, after conviction, was to weigh the gravity of the guilt and to impose an appropriate dose of punishment Little, if any, distinction seems to have been drawn between the adult offender, the adolescent, and the juvenile They were all dangerous, all a nuisance, all fit for punishment, and the main question appears to have been how severe a punishment could be given for the particular offence against the law

In the twentieth century people seem to have become more than a little sceptical of the adequacy of repression and attempted deterrence as the only weapons of the criminal law Fear is not the only emotion that persons concerned with punishment can summon to their side It is notorious—is it not ?—that in the last century the

harshness of punishment excited the further crime which it sought to prevent Pickpockets were never so busy or so prosperous as when they plied their craft among the spectators of a public execution In the very presence of the gallows, those criminals of an earlier day, seeing an opportunity, were blind to the threat

In these days the Juvenile Courts, specially constituted by Act of Parliament to deal with the young offender under the age of 17, and those other courts that deal with the adolescent between 17 and 21, are, when guilt is established, not primarily concerned with weighing out a punishment that can in some curious way be measured as being equivalent to the gravity of the crime They are more and more, in their wisdom and their vision, trying rather to diagnose the condition of the offender, to detect at once his weakness and his possibilities, and if possible to prescribe the most appropriate form of treatment This rather new view of the duty of the Court may involve a degree of knowledge of the individual not hitherto thought to be required When the award of the Court was merely a punishment for an offence, the problem could be resolved, it was thought, by reference to the offence , but if the Court conceives its function as the prescription of treatment, reference must obviously be made to the individuality of the offender He must be studied as closely as his crime, and the information concerning his character and circumstances must be as full and accurate as that which is offered in proof of his crime The police force in the area where the boy's home is can, without doubt, and as a rule, give a valuable outline of his career Those who have had many years' experience of Criminal Courts in England will gladly express their appreciation of the fairness shown by police officers in the evidence they give of a

prisoner's character These officers render invaluable service to the administration of the law by the accuracy and the impartiality with which they discharge that duty In the case of the young delinquent, the Court further requires additional information from the educational authority and from probation officers, and, so far as adolescents are concerned, from the authorities of the prison where they have been awaiting trial

The late Sir William Clarke Hall has reminded all of you of the importance that should be attached to the enquiries made by a probation officer, the result of which is communicated by him to the Court before a decision is reached It may be hoped that this important claim upon their time will always be borne in mind when the number of probation officers—including women officers —required for any area is under consideration The place that the comparatively modern science of "psychology," as it is called, by a borrowing of the name of studies which were familiar to Plato and Aristotle, should occupy in helping a Juvenile Court has still to be defined Every youthful science, like much else, is still upon its trial The "Child Guidance Clinics" that have come into existence in recent years are believed to be serving a useful purpose by enabling probation officers to secure what is called a "psychological" report on a boy or a girl whose behaviour has for some time shown aberration and is now to be brought before a Court In the use they make of such a report, and the reliance they place upon its recommendations, Courts may do well to remember that the study of this modern type of psychology as a science has not progressed very far, and that the number of those who are competent to practise it as an art are very few

There arises another problem, small in itself, yet

presenting features of peculiar difficulty It appears to be necessary that a certain number of young offenders, after their first appearance in Court, should be detained in a suitable place for a week or more, while enquiries are being made into the circumstances of the case For a variety of reasons it is undesirable that they should be allowed to be on bail, and the duty falls upon the local authority of providing a " remand home " or place of detention for boys and girls under the age of seventeen It is only where the Court issues a certificate to the effect that the young defendant is too much depraved or too unruly for such a place, that the boy or girl under seventeen years of age can be sent to prison while on remand or awaiting trial Now the function of the " remand home " is to keep the offender in custody in order to ensure his re-appearance in Court Beyond this fundamental duty lies the more difficult task of using this period for the close examination and observation of the character and the temperament of the young person It may be thought that someone should in this period make the fullest external enquiries covering history and antecedents, while some other person should, with sympathy and understanding, observe the offender very closely but very discreetly in the " remand home " The Court is entitled to have the fruits of all this labour when, on the re-appearance of the young person, a decision has to be made that may affect the whole of the rest of his life It is in trying to essay this second task of observation that the authorities are, as you know, faced with a very practical difficulty During the last year for which figures can be obtained, no fewer than 2,188 young persons were received into " remand homes " But as those persons were scattered over England and Wales, and their stay was but for a week or two, there

are necessarily many areas where on any given day only one or two young offenders can be found in a particular "remand home" It is tolerably obvious that an institution for the observation and examination of young delinquents cannot be run effectively or scientifically where the daily average population never reaches double figures Perhaps in the course of the next few years this difficulty may, in part at any rate, be met by the co-operation of local authorities in establishing central "remand homes" of sufficient dimensions to serve a much wider area Further relief may be found in the use of Home Office Schools, charitable homes, and other similar institutions Reasonable care should, of course, be taken to avoid the risk of contamination, but in many cases there may be little difference between one boy who has been detected in an act of petty larceny and another whose home and surroundings are of such a character that it has been found necessary to remove him from them Probably these young persons should be classified by character rather than conviction

As to the Juvenile Courts before whom these young offenders are to appear, when it is remembered that in a single year no fewer than 25,000 cases are brought before such Courts in England and Wales, the weight of the responsibility thrown upon these Courts may be appreciated A hasty or ill-considered decision arising from a misunderstanding of the facts, or a misinterpretation of the offender, may transform a life of some promise into a career of crime The magistrates of each area are required by the Act of 1933 to appoint from among their number a panel of justices to serve in the Juvenile Courts They will naturally choose those who are most competent to understand the mind of the young, to disentangle the tortuous skein of cause and effect,

and finally to discern the right mode of correction, stimulus, and guidance The public owes no small tribute to those thousands of men and women who week by week devote much time and thought and care to the performance of their duties in Juvenile Courts Anxious to hear all that can be told them of the facts of the offence and the character of the offender, with careful observation and without haste, maintaining the dignity of justice while not allowing the atmosphere of the Court to overwhelm the child into silence, they do indeed perform a great social service to the State

It may be well to think of the composition of these Courts It is a commonplace of family life in England that children should respect and obey their parents There is perhaps no better discipline in the world than the control of the English parent over his child The tradition of this country that makes democracy a safe bet instead of a dangerous experiment is based ultimately on the home life of England—and by democracy is meant that form of government which makes every citizen responsible Yet it is equally true in home life that the grandparent is dangerously apt to forget the need for discipline, to find it easier, as age comes, to say yes rather than no, to agree rather than to forbid, to spoil rather than to train It may therefore be preferred that boys and girls in the Juvenile Courts should be dealt with by parents rather than by grandparents Where there has at times been a misplaced leniency, it is often because the magistrates have yielded to the weeping witness, pleading that the boy should have another chance Too often in such cases is the elderly magistrate tempted to a mistaken kindness, and allows himself to dispose of the case with a few words of benign advice to a tearful youngster, who in ten minutes

may be chuckling in the street Is it not desirable that magistrates in these Juvenile Courts should be of parental age, ranging from 40 to 60, rather than of the grandfatherly period that runs from 60 to a happily distant future? Yet it appears that at a recent meeting of some 200 magistrates, when an irreverent spirit asked for those who were below 60 years of age to hold up a hand, there was no movement, though there were many regrets In order to enable the busy parent of lesser age to sit in these Courts, it may be necessary that they should be held at 6 o'clock in the evening rather than 2 o'clock in the afternoon If such a change is desirable, is there any insurmountable objection? It would be easier for both parents to attend without loss of wages, and for school-teacher, club-leader, and scoutmaster to come and give their view And is it not clear that no one whose hearing is defective should ever be expected to serve in a Juvenile Court? It is of the essence of justice and fair play that the young offender should be heard, and the word "heard" means "heard" He may well be bewildered by the proceedings of the Court, however much they have been simplified by recent legislation and practice Conscious of his guilt, he is apprehensive of his punishment That fact makes him inclined to incoherence and deprives him of the greater part of his small vocabulary It is a tragedy of unfairness that in such a plight he should be sternly exhorted to "speak up!" What child can be expected at such a time to shout the story of his misdoings? Those who sit in Juvenile Courts need cool judgement, large hearts, far-seeing eyes and keen ears

But of course, the right-hand man, the indispensable handmaid, of the Juvenile Court, is the probation officer The men and the women of this service are as remarkable

as they are unknown In a single year nearly 20,000 men and women, boys and girls, are assigned to their care If a similar number were sent to prison for a year, the cost would be twenty times as great The saving of money to the State is striking, the saving of stigma to the individual is immeasurable Most of you have no doubt read a book on probation lately published by the National Association of Probation Officers The fact that it is edited by a lady who for ten years has been the leader of the women visitors at the boys' prison is a guarantee of its value A Departmental Committee, as you know, is now in session, considering the scope of the work assigned to the probation officer It may be well, therefore, to say no more than that the value and the importance of the work done by probation officers have so far received but scant recognition from the community as a whole, and we may wish well to any movement to improve their status and to emphasise their worth

The probation system derives its value from the probation service If the officer has the genius of guide, philosopher and friend, the system succeeds Rightly used, probation can save thousands of offenders every year from a repetition of their crime It should not be confined to young offenders or to first offenders There were few who were, in their divination, so sure as the late Sir William Clarke Hall when he ventured to put an old backslider on probation Many sentences of imprisonment had left the offender unrepentant As prison had failed, Clarke Hall tried probation And sometimes his faith worked the miracle He used probation for the adult as well as for the adolescent and the juvenile The Home Office have now arranged for the attendance of a probation officer at Quarter Sessions

and Assizes, and it may be hoped that the Courts will make full use of this instrument of justice At the same time it is necessary to beware of the excessive use of probation Cases are found from time to time where an offender has been placed on probation three, four, and even five or six times It is not easy to understand such leniency If probation has failed on one occasion, ought there not to be strong reason and exceptional circumstances before the offender is placed on probation a second time? It is hard to imagine a set of circumstances in which what is admittedly an experiment should be tried on many occasions

The occasional misuse of probation tends to bring the system into disfavour and to encourage the offender in thinking that he can repeat his offence with impunity There are no doubt many cases of young offenders under 17 years of age where the surroundings of home, as described to the Court, are so little favourable to proper training that transfer to a residential school appears to be essential There are other cases where probation has been tried and the probationer has failed to respond to the chance which the probation officer has given him For him, too, there can probably be no alternative but committal to a Home Office School These schools were formerly divided into Industrial and Reformatory Schools, but now under the Act of 1933 they are known as Home Office Schools, and the authorities decide according to the age, the character, and the antecedents of each offender the appropriate school where he shall receive training This method may result in a finer degree of classification, which in its turn should reduce to a minimum the chance of contamination, and improve the prospect of providing the right sort of training for the individual offender. The Home Office Schools are not

nursery corners to which naughty children are sent for an unpleasant period of detention, but are residential schools for children who have not had a fair chance at home During the year following the coming into operation of the 1933 Act, some 2,706 boys and girls under 17 were committed to these schools The figure indicates the size of the problem The results are high testimony to the good work done by those who are in charge of the schools The proportion of boys and girls who subsequently make good in life stands as high as 84 per cent There can hardly, therefore, be any undue reluctance on the part of a Court, where probation has been tried and failed, to commit a young offender to one of these schools

As to the highly controversial subject of corporal punishment, you are probably familiar with the elderly and self-satisfied gentleman who, after reciting his own childish misdeeds and the punishment he endured, clinches the argument by leaving us to admire the magnificent result Let us beware of his complacent example One or two general observations may be offered In the first place, it will be remembered as a matter of history that the use of corporal punishment has tended to diminish with the progress of education and civilisation In primitive communities the commonest weapon of the law, it has become to-day a rare instrument But it does not seem safe to argue with reference to corporal, or indeed capital, punishment that because other ways of dealing with the offender have been discovered and developed, there is therefore no place left in the armoury of the law for these two methods of earlier use In the case of young offenders, however, capital punishment has been abolished for those who are under the age of 18, and corporal punishment is rarely ordered by the Court

When the use of the birch is ordered by the Court, it is ordered, as it ought to be, only after the fullest consideration not merely of the facts of the offence but also of the temperament and the character of the particular offender What may prove to be a salutary lesson, and may be in fact the most appropriate form of treatment, for one person may inflict unseen but lasting harm upon another Such a penalty is imposed rarely, with great discrimination, and certainly as a mode of treatment, never as a vindictive expression of revenge Human judges to-day could not, and dare not, measure out retribution "Vengeance is mine, saith the Lord, I will repay"

The problem contains another, and perhaps a greater, crux—namely, the case of the adolescent offender between the ages of 17 and 21 For younger offenders indeed the probation officers, and those who are in charge of Home Office Schools, have worked hard with good results The adolescent is neither so easily handled nor so surely moulded The passions of a man stir within him, but he has not yet laid aside the instability of boyhood He is self-conscious, because he wants to present the bearing of an adult, though he knows inwardly that he has not yet developed the knowledge or the confidence of a full-grown man Probably at no time in his life does he stand in so sore a need of leadership and guidance, hungry for advice, and usually ashamed to seek it The years hurry on with an almost tragic pace, and soon the irresolute adolescent, refusing to face many issues, shirking a definite decision, will become either a sound citizen or an expensive criminal In these quick years between 17 and 21 the die may be finally cast A Court has few more momentous decisions to make than its choice of the right treatment for the

adolescent offender If his record is not too black, he may be put under the care of a probation officer If that course is impossible, for the reason that it has been tried before and failed, or because of the gravity of the offence, the Court is in very many cases faced with a choice between the alternatives of a sentence of imprisonment or a sentence of Borstal training The choice is indeed a crisis—what Euripides might perhaps have called the " hinge of circumstance "

The experience of prison governors appears to be almost invariably against a sentence of imprisonment for an adolescent He may well hate the first few days of it, but in the course of weeks or months he may grow dangerously well accustomed to it, and when he is discharged, the terror of prison that might otherwise have provided the strongest barrier or shield against crime may have paled into insignificance The recorded saying of the gate-keeper of a great London prison, " they come in crying, they go out laughing," is less an indictment of the prison system than a recognition of the fact that a lad soon loses fear of what has become familiar It is natural to wonder, and to wonder again and again, whether prison is the right place of commitment for any one under the age of 21 You remember how Charles Dickens made the old turnkey of 80 years ago say, when Oliver Twist was brought to see old Fagin in Newgate, " It's not a sight for children, sir " You may be inclined to think that we should now say of a prison " this is no place for a boy " When an adolescent is clearly failing to make the most of his life, slipping in his habits, and building no ideal, it is doubtful whether a short time in prison is likely to give him the re-education and (if you can forgive the word) the re-orientation which he requires The confines of a city prison are necessarily

limited There is more opportunity to cramp than to re-create The limitation of the sentence, also, in terms of weeks and months, may prove to be no less unsatisfactory Who can look at a lad in the dock and prescribe the exact amount of time required to change his habits, to induce self-control, and to inspire a new ideal? Nor can it be forgotten that, in spite of all the efforts of the prison administration to separate the young from the old, it is still impossible to ensure that contamination may not in some degree ensue

You may have observed, and observed with profound regret, that in 1933 no fewer than 2,253 boys and 127 girls under the age of 21 years were given short sentences of imprisonment Of the boys 34 per cent had not previously been proved guilty of an offence For some of these, it might be thought a period of probation would have sufficed Of the remaining 1,492, over 800 had two or more previous offences proved against them, and perhaps these offenders, or many of them, would have been suitable for Borstal training It is earnestly to be desired —is it not?—that those who are charged with the critical responsibility of sentencing adolescent offenders will pause and consider long every possible alternative before sentencing a boy or a girl under the age of 21 years to a sentence of imprisonment, however slight The country has now had 27 years' experience of Borstal training A considered verdict should not be much longer delayed The method represents a thoughtful and determined effort to re-educate the incipient criminal between the ages of 16 and 21 years by subjecting him to an arduous programme of training that lasts normally for 2 or 3 years When there was only one institution for lads, there was, no doubt, a grave risk that contamination, due to the association of bad, worse and worst,

might outweigh the advantage of the training But now that there are seven institutions for boys, it should be possible, by assembling in the boys' prison in London all Borstal lads on conviction, to give them a close scrutiny, to classify them into different grades of criminality, and to allocate each to an institution where he is likely to consort with others of a similar grade and receive a training appropriate to his type Why, then, should a Court, in a proper case, be reluctant to commit a boy to Borstal, for fear that he is too good or too bad for the experience ?

In earlier years the Borstal training was largely based on prison discipline and prison methods Gradually, the basis has become educational, and the institutions are now schools of character-building, so framed that each individual character may be studied as a separate and distinct problem The public hears perhaps only of the diversions and the relaxations of Borstal life In reality it is a hard and industrious programme of training, each day containing 16 hours of effort and occupation The system derives its success from the service rendered by the men and the women who devote the working years of their lives, for slight material reward, to the reclamation of difficult and wayward boys and girls The system has been subjected to much criticism and even to some ridicule But those who have had long experience of the critical problem of the adolescent offender declare with confidence that a sentence of Borstal training is in nearly every case an alternative preferable, in the interests of the State and of the individual alike, to a short sentence of imprisonment My recollection returns, by analogy, to the wonderful work of the Hertford Training School for boys at Ware under the wise and devoted leadership of Mr and Mrs S M Palmer

Those who are in daily contact with criminal Courts meet many Borstal failures They rarely come across the silent successes Every time you see the failure again in the dock, deserving condign punishment because he has not profited by the chance that Borstal gave him, it may be fair to remember that he represents but one visible outcome of Borstal and that for every such failure there are somewhere two or three invisible men who have won through a stormy adolescence to a steady and honest manhood And those who know will add a word of special praise for the Institution for Borstal girls at Aylesbury There is to be found a problem of peculiar difficulty, to be solved only by women of great faith, devotion, and understanding The remarkable results achieved in the handling of such difficult material are the only thanks and reward that Miss Lilian Barker and her staff would desire

Nobody can survey, however hastily, this tremendous problem without being deeply conscious of its gravity Most criminals undoubtedly form their habits in the days of youth That is the time of crisis Those who have the responsibility of dealing with them would do well to pool their experience, to be steadily open to new ideas, and to be ready to listen to and accept criticism, always believing that better ways may yet be found You are concerned, not as your forefathers were to punish naughty children by hurting them, but rather to study difficult and absorbing human problems, and to make good men and women out of boys and girls who for the time have lost their way

Let me end as I began—"*Maxima debetur puero reverentia*"—"You owe the highest respect to the young" Such different types of political theorists as Hobbes and Bentham have been able to a large extent

to agree upon the aims of punishment First in importance, they say, is its deterrent power Anatole France, you remember, says, " The interests of justice are sacred, the interests of the offender are doubly sacred, but the interests of society are thrice sacred " Nor do you forget the words of Sir Matthew Hale, " When I am tempted to pity the criminal, I remember that there is a pity also due to my country " Let it be granted that in ordinary cases the chief object of punishment is, in the words of Thomas Hill Green, " to associate terror with the contemplation of the crime in the minds of others who might be tempted to commit it " When it is known in any society that he who commits crime suffers at the hands of a stable and independent system of law, that society receives a guarantee that it will be permitted to go about its business without the persistent interference of crime and lawlessness That which the offender suffers is, in this aspect of the matter, a warning—a " documentum," as the Roman lawyers called it—to persons in general not to commit crime " *Deprendi miserum est* " " It is most unpleasant to be caught " But is it not at least doubtful whether this deterrent power of punishment has nearly so great an effect upon the juvenile offender as upon the adult ? A boy or a young man, naturally enough, weighs less carefully the consequences of his acts, and it is hard to conceive anything more offensive to every notion of common decency than the theory or the belief that the State should seek to deter its adult citizens from crime by pointing to the sufferings which it inflicts upon young offenders Will anyone have the hardihood to deny that in the treatment of these offenders, the main object and interest of the State, for the sake of all, must be reformation ?

Was it not George Eliot who observed that most of the

uncharitable judgements in the world are due to lack of imagination? So often, it would seem, the question with which we are to-day concerned is really one of good will and of readiness to take a little personal trouble There is not merely some difference but all the difference between the mood which asks "am I my brother's keeper?" and the purpose which inspires the words "suffer little children to come unto Me" The fairy in the story, as you remember, said "I am not what I am but what I shall be," and it may perhaps be useful sometimes to reflect that the eternal monuments of the Parthenon were once shapeless stone, and that uncouth marble developed, under the affectionate hand of the sculptor, into the Venus of Milo Forty years ago a great master of Balliol said that "sin also, like sorrow, is healed by time" It is inconceivable that, when he wrote those words, the mind of Benjamin Jowett was directed to any particular efficacy in a term of imprisonment In 1925, on the invitation of the Home Secretary of that day, I had the honour of addressing the International Prison Congress upon "Alternatives to Imprisonment" I concluded what I had to say on that occasion with words which perhaps you will allow me to repeat "This country, at any rate, is rich in means, if they are faithfully employed, for helping those who have made a lapse, and for forming or retrieving a character able to resist temptation and to avoid crime Let us beware of any voices of indolence or of cynicism that might belittle these efforts or hamper their further development Above all, let us put aside the heresy that in some cases it may be right to consult the interests of the offender, while in other cases it is necessary to consult the interests of the public Upon any fair analysis, those interests are found to coincide The State may sometimes be com-

pelled to be stern It must not be cruel It cannot afford to be indifferent " I am still of the same opinion, and venture to suggest to you that those words, if true at all, are true not least in cases where the offender is young

XXXVIII

THE HABITUAL CRIMINAL[1]

THIS appellant pleaded guilty at the Central Criminal Court to counts in an indictment charging him with burglary, stealing and receiving, and uttering a forged cheque He was also found to be a habitual criminal He was sentenced to three years' penal servitude and five years' preventive detention The statutory notice given by the Director of Public Prosecutions was based primarily, but not exclusively, on the proposition set out in s 10, sub-s 2 (b) of the Prevention of Crime Act, 1908, and it stated that on September 6, 1917, the appellant was found by a jury to be a habitual criminal and was then sentenced to six years' preventive detention The statutory notice added that evidence might also be given of a long series, set out in the notice, of previous convictions against the appellant At the trial, upon proof being given that the appellant had already been found to be, and had been sentenced as, a habitual criminal, he was told by the Court that evidence on his part was " of no avail," and the jury was directed that it was compelled to find that he then was a habitual criminal The appellant appeals against that finding

It is said on the part of the prosecution that in a case where the notice served on the prisoner contains the statement set out in s 10, sub-s 2 (b), of the statute, the

[1] Judgement in the Court of Criminal Appeal, 1924

only question is one of identity—namely, is this prisoner the same person as the one who was previously found to be a habitual criminal and sentenced to preventive detention? If that question is answered affirmatively, it is contended that the jury has no choice in the matter, that its verdict becomes purely automatic, that no other question arises and no other evidence is admissible, and that the jury is bound to find as a fact that the prisoner still is, at the time when the verdict is given, a habitual criminal This result, it is said, follows from the judgements given in three decided cases Those cases are *Rex v Collins*, which is not reported, *Rex v Davis* (1917, 2 K B 855) and *Rex v Stanley* (1920, 2 K B 235) But an examination of those cases seems to show that the proposition is not accurate In *Rex v Davis* the question was not whether in such a case the jury must, but only whether it might, find that the prisoner was still a habitual criminal It appears from the passage in the report of that case, in which the decision in the unreported case of *Rex v Collins* was referred to in argument, that that also was a decision to the same limited effect In other words, each of those two cases turned upon the question, not whether in such circumstances the jury was bound to decide against the prisoner, but whether, if the jury thought fit in all the circumstances of a particular case, it was sufficient for the prosecution to prove that the prisoner had formerly been found to be a habitual criminal and as such had been sentenced The difference, and it is a noteworthy difference—and, indeed, the essence of the matter—appears, for the first time, in the decision in *Rex v Stanley* (1920, 2 K B 235) In that case, undoubtedly, it was argued, and the Court held, that such evidence was not only sufficient, but also unanswerable, or, in other words, that, where the

prosecution choose to treat the proposition set out in s 10, sub-s 2 (b), of the statute as the ground, or one of the grounds, of the charge that the prisoner is a habitual criminal, he has, and can have, no answer apart from the simple question of identity, and the jury, subject only to that question, has no alternative but to return a verdict against him That decision is entitled to great respect But two points are to be observed The first is that in that case the appellant, the prisoner, was not represented, and no argument whatever was addressed to the Court by counsel on his behalf The second is that the judgement purports to be based upon the judgements in the earlier cases of *Rex v Collins* (unreported) and *Rex v Davis* (1917, 2 K B 855), and neither contains nor suggests any reason for going beyond what the judgements in those cases laid down "Can" appears to become "shall," "may" appears to become "must," but for reasons which are not explained The question here is whether the judgement in *Rex v Stanley* (1920, 2 K B 235) is to be followed If it is to be followed, the true proposition, no doubt, is that which has been contended for by the prosecution in the present case—namely, that as soon as it is decided to include in the statutory notice the statement contained in s 10, sub-s 2 (b), it is made certain beforehand that the jury, subject only to the question of identity, must find against the accused

It was suggested in argument that the question is really of no importance and has merely an academic interest But it is not possible to accept that view The statute which has to be interpreted was enacted, it is true, no more than sixteen years ago But it is not a statute enacted for a limited period, and fifty years hence, should the argument for the prosecution be sound, although a man may have been living honestly for the

next preceding forty years, a jury may, if he then lapses once, be compelled to find that he is still a habitual criminal because he was so found half a century before It is said that in such a case, although the prisoner is found to be a habitual criminal, it is not necessary that he should be sentenced to a further period of preventive detention That observation is no doubt true But it affords no reason for a finding that the prisoner is a habitual criminal unless the clear provisions of the statute are such as to include him As was said by Wright J in *London County Council v Aylesbury Dairy Co* (1898, 1 Q B 106, 109) "I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language"

The question is, therefore, what does the statute mean? Now, it is to be observed that by s 10, sub-s 1, the provisions concerning detention of habitual criminals apply only in cases where, after conviction for a crime, "the offender admits that he is or is found by the jury to be a habitual criminal" That is to say, unless the offender makes the admission, it is in each case a question, not of law for the judge, but of fact for the jury, whether the offender is or is not a habitual criminal Then sub-s 2 of s 10 enacts that "a person shall not be found to be a habitual criminal unless the jury finds on evidence" one or other of two things (a) or (b) Here, again, the statute seems deliberately to make it plain that the question is one of fact for the jury, to be determined by the jury on evidence Sub-s 1 has already enacted that, in the absence of an admission on the part

of the offender, it is for the jury to find whether he is a habitual criminal It follows that when sub-s 2 provides that "a person shall not be found to be a habitual criminal unless" one must read in the words "by the jury" after the word "found," so that the opening words of sub-s 2, when they are written out in full, read in this way "a person shall not be found by the jury to be a habitual criminal unless the jury find on evidence" (a) or (b) The question for the jury seems always to be the general question —Is this offender a habitual criminal? and the jury must not answer that question in a sense adverse to the offender unless, at least, it is satisfied of the truth of one or other of the two propositions (a) or (b) In other words, the affirmative answer of the jury to the general question must at the least be founded upon, and involve, an affirmative answer to the particular question This view of the matter seems to be strengthened by the remaining provisions of the section It is, for example, provided by sub-s 3 that in any indictment under the section "it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal"—that is to say, the general proposition—and in sub-s 4 the question for the jury appears to be expressly defined and set out in these exact words "the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal," that is to say, the general question Some difficulty appears to have arisen in the course of the present controversy, because it seems in some quarters to have been thought that the two propositions (a) and (b) set out in sub-s 2 contain in themselves a complete and exhaustive, though alternative, account of the grounds upon which the charge that the offender is a habitual criminal may be founded But in our

opinion this view cannot be sustained The closing words of sub-s 4 make it reasonably plain that no such limitation is intended On the contrary, the words are quite general—namely, "the notice to the offender shall specify the previous convictions and the other grounds" (in the plural) "upon which it is intended to found the charge" If these words are read side by side with the propositions (a) and (b) contained in sub-s 2, and the issue formulated in sub-s 4, it is apparent that the notice may contain any grounds upon which the jury may reasonably be asked to come to the general conclusion that the offender is a habitual criminal, but, in order to be effective, those grounds must at least contain sufficient material to enable the jury to be satisfied in particular of the truth of proposition (a) or of proposition (b) And, indeed, in the present case, although the statutory notice contained proposition (b), it went on to mention a series of previous convictions More than that, by sub-s 5 of the same section it is expressly provided that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life" In these words there is nothing to say or to suggest that, where the statutory notice is directed primarily or exclusively to proposition (b) in sub-s 2, the accused is debarred from giving or tendering evidence on his own behalf The words of sub-s 5 seem clearly to point to the opposite conclusion

The general question, Is this offender a habitual criminal? is, and must always be, in the absence of admission, a question of fact for the jury to determine But if it really is a question of fact for the jury, it seems

a little remarkable that it should be the duty of the judge —as the argument for the prosecution here contends— to leave the question of fact to the jury by the unusual method of directing the jury to find a verdict against the accused person

The argument for the prosecution appears manifestly, and indeed, admittedly, to involve at least three contentions (1) That the words in s 10, sub-s 2, " shall not be found unless " mean " shall be found if ", (2) that the words introduced in this way are intended to be alternative definitions of the term " a habitual criminal " , and (3) that, although the question is made by the statute a question of fact for the jury, nevertheless, if the evidence is such as to establish what is set out either in proposition (a) or in proposition (b) in s 10, sub-s 2, it is the duty of the judge to direct the jury as matter of law to determine the question of fact in a sense adverse to the accused person There is, in our opinion, no sufficient warrant for these contentions The words " shall not be found unless " seem clearly to lay down certain conditions precedent, or safeguards, and are not apt words to express a definition The use of words of qualification, exception, proviso, or condition to convey by themselves a substantive affirmative proposition is always inaccurate as a form of diction There are no doubt varying degrees of harshness Examples are " no one except is," " never except when," " is not unless," and " shall not be found unless " Perhaps the last form is the harshest, and it is the form to be dealt with in the present case It would be easier to extract an affirmative out of the words " no one is a habitual criminal unless he is," etc In our opinion the view that sub-s 2 contains a definition is contradicted as well by the words themselves as by the scheme and the

language of the whole section and its various parts It may be observed that the supposed definition relates to, and deals only with, the functions of the jury, and leaves untouched and undefined the habitual criminality to which, it is contemplated, a prisoner may plead guilty

Moreover, it is not seriously contended here that the language of the section considered as a whole is not capable of a construction which avoids the consequences that flow from treating the words referred to as a definition It is not necessary to dwell upon the presumptions against the view that a statute intends what is unreasonable, unjust, or absurd The rule is clear that when the language of a statute admits of more than one construction, and if its construction in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended unless the intention be manifested in express words And, as was said by Lord Esher M R in *re North* (1895, 2 Q B 264, 271) "There is the rule of construction that if a statute, which so affects a man's status as to be in effect a penal enactment, is capable of two constructions, that one should be adopted which is most favourable to the person affected" Or again, in the words of Lord Abinger C B in *Henderson v Sherborne* (1837, 2 M & W 236, 239) "The principle adopted by Lord Tenderden, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so"

It is said, by way of suggested comparison, that in every case where a prisoner, after being convicted of an offence, is called upon to admit a previous conviction and denies it, the jury has the same function as that which the

argument for the Crown would permit to the jury in the present case But it is tolerably clear that the implied argument is an argument in a circle In the cases where the sole question is whether the defendant was the person previously convicted, it is obvious, *ex hypothesi*, that there is no other question But, in the examination of the difficulty involved in the present case, the crux of the matter is precisely the inquiry whether there is not another and larger question than the question Was the defendant the person who was previously found to be a habitual criminal? In other words, the controversy here is whether, upon the true construction of the statute, there is not for the jury a question other than the question of mere identity That controversy is not illuminated by the statement that where the sole question is one of identity no other question arises

It is further contended that it must be right to direct the jury that it has no choice in the matter where the statutory notice contains proposition (b), because (it is argued) it must be right to direct the jury that it has no choice in the matter where the notice contains proposition (a) of s 10, sub-s 2, and the evidence is such as to establish the proposition But this argument appears to rest upon no sufficient foundation The requirements of proposition (a) are satisfied in full as soon as it is proved, for example, that the defendant was three times convicted after a specified age and that he is leading persistently a dishonest life The words are "dishonest or criminal" not "dishonest and criminal," and the words are "is leading persistently" not "has since the last of such convictions been leading persistently" Yet it might well be that a jury should, and would, decline to find the defendant to be a habitual criminal if he suc-

ceeded in establishing, for example, that for many years after the last of the three convictions he had lived an honest life, or that the convictions, or some of them, were for comparatively minor offences, or that they or some of them were separated by such an interval of time as not to point to a habit Certainly it has not yet been suggested that evidence to that effect would be irrelevant, though in the present case the defendant was informed, and, if the argument for the Crown be correct, was rightly informed, that it would be a mere waste of time for him to offer to the jury evidence relating to his mode of life subsequent to his release from preventive detention Where the statutory notice is given with special reference to proposition (a) in s 10, sub-s 2, and the evidence proves the proposition, nevertheless the offender may rightly be found not to be a habitual criminal To take an illustration a man of fifty years of age may be found to have been three times convicted of crime between the ages of sixteen and twenty-five years, and the evidence may prove that he is leading persistently a dishonest life by persistently pretending to be in Holy Orders, or to be a qualified medical man Yet the jury might say, and say properly, that he was not the sort of person the Act was aimed at, and that he ought not, because he had committed some fresh offence, to be found to be a habitual criminal It was suggested in argument that the term " habitual criminal " is a term which, taken by itself, is extremely vague and difficult to understand But under the provisions of this statute the jury has not the task of inquiring whether the offender is a habitual criminal if he himself admits that he is one It does not seem to be an extravagant view to suppose that, in the judgment of the Legislature, a jury, no less than a prisoner, might be expected, without undue

offender from offering evidence It is this compendious fulfilment of a condition precedent, and not something else, which appears to be referred to in the judgement in *Rex v Davis* (1917, 2 K B 855) as giving rise to possible hardship In all such cases it is tolerably obvious that much may depend upon the length of the interval elapsing between the date of release from preventive detention and the date of the further charge under the statute That interval may be weeks, or months, or years, and even many years In each case it is, in our opinion, a question of fact for the jury to decide whether the charge that the offender is (not was) a habitual criminal is established

In our opinion, therefore, a direction was in the present case given to the jury which was too unfavourable to the appellant, and he was prevented from giving evidence on his own behalf But it might, nevertheless, be contended that no substantial miscarriage of justice has actually occurred, and that the proviso to s 4, sub-s 1, of the Criminal Appeal Act, 1907, ought to be applied That contention would involve the argument that, in view of the undoubted facts relating to the criminal career of the appellant, the jury, upon a proper direction, could not rightly have done otherwise than come to the same conclusion as that to which it came in the actual course the trial took There is, it is clear, much to be said for that contention Upon the whole, however, in view of all the circumstances, we do not think it necessary or desirable to apply the proviso to the facts of the present case In the result, therefore, the appeal is allowed, and the sentence of preventive detention is quashed

THE END